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THE

LAW REPORTS.

529 N

Division I.—Chancery.

CASES

DETERMINED BY THE

CHANCERY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

CHIEF JUDGE IN BANKRUPTCY

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE CHANCERY DIVISION AND THE CHIEF JUDGE

AND IN

LUNACY.

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Page	*Line*	*For*	*Read*
9	10	resolution	dissolution.
36	head-note 11	£15,950	£11,950.
37	— 4	1870	1873.
43	— 10	£1000	£10,000.
51	— 12	Defendants	solicitors.
144	12, 13	Defendant's	Plaintiff's.
166	— 3	23 & 24 Vict. c. 36	23 & 24 Vict. c. 34.
327	— 2	after the word "children" *add* "and two others, viz., the Petitioner and one of the Defendants."	
379		after judgment of *James*, L.J., *add*	*Mellish*, L.J., concurred.
541	— 10	Defendant's	draft.
668	9	*E. B. Cooper*	*E. Ford.*
765	— 3	*F. G. Wood*	*James G. Wood.*

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CASES

DETERMINED BY THE

CHANCERY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

CHIEF JUDGE IN BANKRUPTCY

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE CHANCERY DIVISION AND THE CHIEF JUDGE

AND IN

LUNACY.

In re EUROPEAN ASSURANCE SOCIETY ARBITRATION ACTS AND INDUSTRIAL AND GENERAL LIFE ASSURANCE AND DEPOSIT COMPANY.

C. A.
1876
May 1.

COCKER'S CASE.

Novation—Amalgamation of Companies—Transfer of Liabilities—Duty to set apart Fund—Acquiescence by Policy-holder.

By the deed of settlement of the *I.* insurance company it was provided that the funds and property of the company should alone be answerable for claims on the company; provision was also made for enabling the proprietors to dissolve the company, and thereupon the directors were to obtain from some other company an undertaking to pay the claims on the *I.* company, and were to transfer to such other company so much of the assets as should be agreed upon as sufficient to meet such claims. The *I.* company was accordingly dissolved, and a portion of its funds transferred to

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the *E.* company, which covenanted to satisfy the liabilities of the *I.* company.

C. was a policy-holder of the *I.* company on the non-participating scale, and as such was not entitled to a vote at the meetings of members. His policy was made subject to the conditions of the deed of settlement. He had notice of the intended amalgamation, but had no formal notice of the completion of the amalgamation, nor was his policy indorsed by the *E.* company. He, however, paid the premiums and took receipts in the name of the *E.* company for fifteen years, after which both companies were ordered to be wound up, and came under the *European Assurance Society Arbitration Acts*:—

Held, first, that there was no obligation on the *I.* company to see that the assets transferred to the *E.* company were appropriated for the payment of the claims on the *I.* company; that the amalgamation, being *intra vires*, was binding on the policy-holders, as in *Hort's Case* (1):

Secondly, that even if it had not been binding on the policy-holders generally, *C.* was bound by his conduct, and had accepted the liability of the *E.* company.

Statement.

THIS was an appeal from a decision of Lord *Romilly*, as arbitrator under the *European Society Arbitration Act*, 1873, whereby he decided that *Matthew Cocker* was not entitled to rank as a creditor of the *Industrial and General Life Assurance and Deposit Company* under a policy of life insurance effected with that company.

The policy, which bore date the 22nd of July, 1851, was effected by *Cocker* on the non-participating scale on the joint lives of himself and *Sarah Ann Cocker*, his wife, for the sum of £100, at the yearly premium of £2 0*s.* 6*d.* It was executed by three directors and sealed with the company's seal, and it was thereby witnessed that if the premiums were punctually paid at the office of the company, the funds and other property of the said company should be liable, according to the provisions of the deed or deeds of settlement of the said company, to pay to the said assured, his executors, administrators, or assigns, within three months after satisfactory proof had been given of the death of either of the said *M. Cocker* and *Sarah Ann Cocker*, the sum of £100: Provided always that the capital stock of the company, or so much thereof as for the time being should have been subscribed, and the other stocks, funds, securities, and property of the said company remaining at the time of any claim or demand made,

(1) 1 Ch. D. 307.

unapplied, and undisposed of, and inapplicable to prior claims and demands, in pursuance of the trusts, powers, and authorities contained in the said deed or deeds of settlement, should alone be liable to answer and make good all claims and demands upon the said company under or by virtue of the said policy and all other policies; and that no director, proprietor, or member of the said company, his heirs, executors, or administrators, should, by reason of any policy of assurance or instrument securing annuities, or of the whole of the policies of assurance, and instruments securing annuities taken together, which any director had signed or might sign, be in anywise individually or personally liable or subject to any claims or demands against the said company beyond the amount of the unpaid part of his particular share or shares in the said capital stock, or in such part of the said capital stock as for the time being should have been subscribed.

The *Industrial Company* was formed under a deed of settlement dated the 10th of December, 1849, and was completely registered under the *Joint Stock Companies Act*, 1844 (7 & 8 Vict. c. 110).

The following clauses were specially referred to in the argument:—

By clause 2 it was provided that the word "members" should mean all persons who had assured with the company on the terms of participating in the profits of the company; and that the word "assured" should mean all persons, either members or not, who should have effected any policy of assurance, or grant of annuity, endowment, or other premium from the company.

By clause 20 it was provided that every proprietor and member present at a general meeting should be entitled to vote at that meeting.

Clause 190 was as follows: "It shall be lawful for an extraordinary board of directors, specially called for the purpose, to enter into a resolution recommending the dissolution of the company, and upon such dissolution being so recommended the same extraordinary board shall cause an extraordinary general meeting to be convened for the purpose of taking into consideration the propriety of dissolving the company; and if at such extraordinary general meeting a resolution shall be entered into for dissolving the company, then the board of directors shall call a second extra-

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ordinary general meeting, for the purpose of confirming or rejecting such dissolution; and such second extraordinary general meeting shall be held within the space of forty days after the resolution for dissolving shall have been entered into at the first extraordinary general meeting; and if such resolution for dissolving shall have been confirmed at such second extraordinary general meeting, then from the time of such confirmation the company shall be dissolved, and the business thereof shall be concluded."

Clause 191 was as follows: "That immediately upon the dissolution of the company the board of directors shall, out of the funds or property of the company, pay and satisfy all the immediate claims and demands on the company arising from assurances or other contracts or engagements, and shall obtain from some other assurance company, or from the directors or managers of some other assurance society or company, an undertaking to pay and satisfy the remainder of the claims and demands on the company arising from assurances, annuities, or other contracts or engagements, when and as the time for the payment and satisfaction of the same shall respectively arrive; and shall cause to be transferred to some other assurance company, or to some of the trustees or directors of such other assurance society or company, so much of the funds or property of the company as shall be agreed upon between the contracting parties, as will be sufficient, with the premiums that may become payable in respect of all their existing policies, to enable the society or company from whom or from whose directors or managers the undertakings shall have been obtained to comply therewith, and shall make such arrangements with the said assurance company or the said directors or managers in regard to the said undertakings as the board of directors shall in their discretion think fit, and shall cause to be done and executed all such acts, deeds, and things as in the opinion of the board of directors shall be necessary or advisable for carrying the same engagements into effect: and if any funds or property of the company shall remain after answering the purposes aforesaid, shall cause the same, or so much as shall not consist of money, to be sold, got in, or otherwise converted into money, and shall cause the moneys arising from the said remaining funds or property, or

of which the same shall consist, to be paid and distributed at such time or times as they shall think fit, to and amongst the proprietors and other holders of shares in the temporary capital of the company and the members, according to their respective rights and interests therein; and notwithstanding the dissolution of the company, these presents and the provisions herein contained, and all powers, privileges, rights, and duties of the proprietors and other holders of shares and members, including the powers to call and hold extraordinary general meetings of proprietors and members, and the power to call for and enforce the payment of further instalments or shares, shall until all claims and demands shall have been respectively satisfied and provided for as aforesaid, and until a final decision shall have been made of the residue (if any) of such moneys as aforesaid, remain and continue in full force, so far as the same may be necessary for winding up the concerns of the company, and for enabling the board of directors to dispose of the funds or property of the company, and to satisfy and provide for such claims and demands, and to make such payments and distribution as aforesaid."

Another company, called the *People's Provident Assurance Society*, was established under a deed of settlement dated the 2nd of September, 1854, and was completely registered under the *Companies Act*, 1844.

In September, 1855, negotiations were carried on between the *Industrial Company* and the *People's Provident Society* for an amalgamation, and on the 23rd of October, 1855, a report of the directors of the *Industrial Company* was issued to the shareholders and policy-holders of the company, which stated the terms of the proposed amalgamation, and recommended its adoption. Although by the constitution of the company *Matthew Cocker*, not being a participating policy-holder, was not properly a member of the company, and was not entitled to vote at the meetings, it was admitted, for the purpose of the special case, that he received a copy of this report.

The amalgamation was agreed to and confirmed by extraordinary general meetings of the members and shareholders, and was carried into effect by a deed dated the 6th of November, 1855, and made between the two companies. By this deed the

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two companies mutually covenanted that immediately on the dissolution of the said *Industrial Company* the whole business, assets, and property of the company should be consolidated and amalgamated with the business, assets, and property of the *People's Provident Society*, and the said society should continue as theretofore to be regulated in all respects by the said deed of settlement of the 2nd of September, 1854; that, accordingly, upon the said amalgamation, the present manager of the said *Industrial Company* should be the manager and secretary of the *People's Provident Society;* that as soon after the completion of the said amalgamation as circumstances would permit, the business of the *People's Provident Society* should be principally carried on at No. 2, *Waterloo Place*, the present principal office of the *Industrial Company;* and by the last clause, that the *People's Provident Society* should pay and satisfy all the claims and demands on the said *Industrial Company* arising from assurances, annuities, or other contracts or engagements whatever, when and as the times for payment or satisfaction of the same should respectively arrive, and should indemnify the *Industrial Company* and each of the members and shareholders against all such claims and demands.

After the amalgamation, the business of the united companies was carried on at No. 2, *Waterloo Place*, the late office of the *Industrial Company*, under the name of the *People's Provident, Industrial, and General Life Assurance Society.*

Cocker's policy was not indorsed by the *People's Provident Society*, nor was any new policy issued. He did not receive any formal notice of the completion of the amalgamation.

By the *European Society's Act*, 1859, the *People's Provident Society* was incorporated with and its name changed to that of the *European Assurance Society*, and the business was carried on under the new name at the same offices.

The *European Society* was ordered to be wound up by an order dated the 12th of January, 1872, and the *Industrial Company* by an order dated the 7th of June, 1872.

The premiums on *Cocker's* policy were paid by him at the office in *Waterloo Place* until the date of the winding-up. Before the amalgamation with the *People's Provident Society* the receipts were headed "*The Industrial and General Life Assurance and*

Deposit Company." After the amalgamation they were headed "*The People's Provident Assurance Society*, with which is incorporated the *Industrial and General Life Assurance Company*," until the incorporation of the company with the *European Society*, and they were then headed "*The European Assurance Society.*"

Statement.

Lord *Romilly*, as arbitrator, under the *European Assurance Society's Arbitration Acts*, decided that *Cocker* was not entitled to prove against the *Industrial Company.*

In giving judgment on the 18th of November, 1874, His Lordship said:—"I am of opinion that Mr. *Cocker* assented to the arrangement indicated by the circular, and that he assented to the terms of the deed of the 6th of November, 1855, by which it was carried into effect. I am also of opinion that the fact of Mr. *Cocker* having paid his premiums after the year 1855, and taken receipts for the same in the form referred to in the case, is evidence that he looked to the *European Society* for payment of the moneys assured by his policy, and intended to release the *Industrial Company.* I am still more strongly confirmed in this view by finding that a case similar to this has been before me at the Rolls. In *Carr's Case* (1) a policy-holder was bound by years of acquiescence in a similar arrangement, whereby he paid his premiums to another company, and acted in every way upon it. The objection there was that a formality in the deed of settlement had not been observed; I held that he was bound, whether there was any clause of dissolution in the deed of settlement or not, and whether, if there was, it had been observed in the deed of amalgamation or not."

Mr. *Reilly*, the present arbitrator, having certified that it was a proper case for appeal, *Cocker* appealed from Lord *Romilly's* decision.

Waller, Q.C., and *J. Wilkinson*, for the Appellant:—

Argument.

The present case is in many respects similar to *Hort's Case* (2), but it differs from it in some important particulars. In *Hort's Case* the policy-holder received notice of the completion of the amalgamation of the companies, and was invited to send in his policy to be indorsed, which he accordingly did. No such notice

(1) 33 Beav. 542. (2) 1 Ch. D. 307.

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was given to *Cocker*, nor was his policy indorsed. He only paid his premiums at the office, which was the old office of the *Industrial Company*, and accepted the receipts which were sent him. This was not sufficient to shew his consent to the amalgamation: *Conquest's Case* (1). It is true that, according to *Hort's Case* (2), his consent was not necessary if the amalgamation was properly carried out within the powers of the deed of settlement; but we contend that this was not the case. The intention of the deed was, that the *Industrial Company* should calculate and hand over a sufficient fund to the new company to satisfy the policy-holders, and the fund should have been kept separate and ear-marked for their benefit. In *Wood's Case* (3), where there was a similar clause, Lord *Cairns* says: "The clause contemplates that this fund should be ear-marked and appropriated in some way when the amount should have been ascertained, so that there might be added to it the premiums on the policies transferred, and so that it might be ascertained that the fund transferred and the accruing premiums would be sufficient to pay the policies, the liability on which was transferred." That case is exactly in point.

Higgins, Q.C., and *Romer*, for the official liquidator, were not called on.

Judgment.

LORD CAIRNS, L.C.:—

We have no hesitation in saying that we think this case governed by the decision in *Hort's Case*. The case to which Mr. *Waller* has referred (*Wood's Case* (4)) would not necessarily be binding on this Court, being a decision in the *Albert* Arbitration; but my present impression is that the deed in that case had certain peculiarities which do not appear in the present case. But whether that be so or not, it appears to us that the deed in the present case is exactly the same for the present purpose as that which this Court had to consider in *Hort's Case*. We think there was here a deed by which the policy-holder was bound, and that the contract of the policy-holder being that the assets of the company should be liable to him according, and only according, to the

(1) 1 Ch. D. 334.
(2) Ibid. 307.
(3) Reilly's Alb. Arb. Cas. 54, 58.
(4) Ibid. 54.

provisions of the deed of settlement, anything that was done with those assets, justified by the terms of the deed of settlement, was an appropriation of the assets to which the policy-holder could not object.

But there was here *bonâ fide* an arrangement agreed upon between the two companies, the *Industrial* and the *People's Provident*, for amalgamation. It was an amalgamation in the strictest sense of the term, for every shareholder in the *Industrial* was to become a shareholder in the *People's Provident*. The mode in which the amalgamation was carried out was by a resolution of the *Industrial* according to the terms of the deed of settlement, and after a resolution at some general meetings according to the deed had been come to. A further mode in which the amalgamation was to be carried out was by handing over, consequent upon a dissolution, the whole of the assets of the *Industrial Company* to the *People's Provident Society*, and then the only diminution or subtraction from those assets was this, that inasmuch as the value of a share in the *Industrial Company* was upon calculation taken to be greater than the value of a share in the *People's Provident*, every shareholder in the *Industrial Company* was to receive not merely a share in the *People's Provident* in exchange, but also a bonus of 1*s.* in cash, representing the greater value of the share which he gave up. The payment of that 1*s.* a share was in the nature of an advance or distribution of the surplus assets, as it were, of the *Industrial Company*, after providing for all the claims upon it, and a distribution of surplus assets of that kind was warranted by the provisions of the deed of settlement. In our opinion, therefore, the provisions of the deed of settlement were complied with. I cannot read the clause of the deed now before us, at all events, as meaning that upon an arrangement of this kind the assets handed over to the transferee company were to be ear-marked and kept separate for the purpose of being applied to the payment, and only to the payment, of liabilities accruing on policies of the old company. In my opinion, the meaning of the clause of the deed now before us is this, that the assets handed over to the transferee company would become assets generally of the new company. That was done in this case, and I may add that Mr. *Cocker* having had notice before, in the clearest and most

C. A. 1876 COCKER'S CASE. Judgment.

express terms, that an amalgamation was about to take place, warranted, as the two companies conceived, by their deeds of settlement, had notice subsequently within a year that the amalgamation had actually taken place; he had that notice by the receipt that was given to him on the next payment of his premium, and he continued to have that notice for many years afterwards. If he desired to investigate the details of the arrangement for amalgamation—still more, if he desired to make any objection to those details, the time for him to have done so would have been on receiving the notice that the amalgamation had taken place. Instead of that he remained for fifteen years paying the premiums on the footing of the amalgamation, and during all that time he was entitled, if the amalgamated company had been a success and had turned out prosperously, to the advantages he would thereby have derived, and it is not until after the state of insolvency of that company is ascertained that this claim is made to go back to the old company, and to assert his right against it. I repeat that it is my opinion, and also the opinion of my learned colleagues, that the case is entirely governed by the *ratio decidendi* in *Hort's Case*. The same order will be made as to costs as in *Hort's Case*.

JAMES, L.J., and BAGGALLAY, J.A., concurred.

Solicitors for Appellants: *Stevens, Wilkinson, & Harries.*
Solicitors for Respondents: *Mercer & Mercer.*

C. A. 1876 *May* 1, 2.

In re EUROPEAN ASSURANCE SOCIETY ARBITRATION ACTS.

RIVINGTON'S CASE.

Contributory—Amalgamation—Transfer of Shares—Trustee—Subsequent Inrolment—Separate Shareholder.

Post 22-4

With a view to the transfer of the business of the *A.* insurance company to the *B.* insurance company, the greater number of the shareholders in the *A.* company agreed to assign their shares to trustees for the *B.* company. In the case of one of these shareholders, he assigned his shares to a trustee for the *B.* company, receiving the consideration money out of the assets of the *A.* company, though there was no evidence that this was known to

him. By a private Act of Parliament transfers of shares in the *A.* company were to be inrolled in Chancery, but the transfer of these shares was not inrolled until four years after the transfer, when the *A.* company ceased to carry on business. Eight years afterwards an order was made for winding up the *A.* company, which had large liabilities, but no assets except such as could be obtained by calling up the shares, and it was held in the winding-up that the claims of the policy-holders in the *A.* company continued in force against that company:—

Held, that the case of this shareholder was to be considered by itself, and without reference to the effect which the decision might have upon the general winding-up:

Held, that there was nothing unlawful, and no breach of trust in the arrangement between the two companies so as to make the transfer of the shares invalid:

Held, that the subsequent inrolment of the transfer was sufficient:

Held, that this shareholder was not a contributory in the winding-up of the *A.* company.

Statement.

THE *British Commercial Insurance Company* was established in 1821 with a nominal capital of £1,000,000 in £50 shares. 1200 shares were subscribed for, and £5 was paid on each. The company was afterwards regulated by local and personal Acts of Parliament (2 & 3 Will. 4, c. xxxviii. and 10 & 11 Vict. c. lxxxiv.) enabling the company to sue and be sued, under which Acts inrolment in Chancery of a memorial was made necessary for an effectual transfer of shares. The company was never registered under the *Joint Stock Companies Act*. *William Rivington* held 200 shares in the company.

The *British Nation Life Assurance Association* was in 1855 incorporated and registered under the Acts with a capital of £300,000 in £1 shares. On the 17th of November, 1859, the manager of the *British Nation*, in pursuance of resolutions of the directors, wrote to the directors of the *British Commercial* a letter to the following effect:—

"Gentlemen,—It has been suggested to the directors of this association and to myself that a union of the business of the *British Commercial Insurance Company* with this association would be advantageous to both institutions, and for the following reasons:—

"The proprietary of the *British Commercial* might, if they so desired, be paid off at a price to be agreed upon, say 25*s.* per

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RIVINGTON'S CASE.

Statement.

share, and transfer of such shares to be taken by trustees to be appointed by this association.

* * * * * *

"Under these circumstances, the directors of this association would be glad if the directors of the *British Commercial* would consider this letter as a basis of a proposition for a union of the business of the *British Commercial* and *British Nation Companies* upon the following understanding:—

"The shareholders of the *British Commercial* should be paid off at the rate of 25*s.* per share, and their shares transferred.

* * * * * *

"That two trustees should be appointed to hold the assets of the *British Commercial* pending the completion of the proposed arrangements.

"That an Act of Parliament should be forthwith applied for if agreed to be necessary to consolidate the proposed union.

"Thus a strong company may be formed to the permanent benefit of all interested."

On the 2nd of January, 1860, the directors of the *British Commercial* passed resolutions accepting this proposal, subject to the approval of their proprietors. A meeting of the proprietors was accordingly called for the 21st of January, 1860, and duly advertised. A circular was also issued to the proprietors, giving notice of the meeting, and stating that the object of the meeting was to consider a proposal for the transfer of the business and assets to another company, and that the proposal contained an offer of 25*s.* per share to the shareholders, who would also be relieved of their liability in respect of such shares.

The meeting was accordingly held, and the following resolutions were passed:—

1st. "That the proposal of the *British Nation Life Assurance Company*, as contained in their letter of the 17th of November last, now read, be and is hereby adopted and accepted."

2nd. "That with a view of carrying out the last resolution for the union of the two companies, the shareholders of this company present at this meeting do approve of and accept the proposal made on behalf of certain members of the *British Nation Life*

Assurance Association for the purchase of shares in their company at the price of 25*s.* per share.

"That the directors be and are hereby authorized and empowered to take such steps in accordance with the provisions of the deed of settlement of this company as may be necessary to carry such proposal into effect on behalf of the shareholders.

At a meeting of the *British Nation*, held on the 20th of January, 1860, a resolution was passed that—"This meeting having heard the terms of the proposed arrangement with the *British Commercial Insurance Company*, approve of the same, and hereby authorizes and empowers the directors of this company to take such steps as they may consider necessary for carrying the same into effect, and to issue, in lieu of the payment of 25*s.* per share to such proprietors of the *British Commercial Insurance Company* as may elect to receive the same, shares in this association, either wholly or in part paid up to the extent of 30*s.* for each *British Commercial Insurance Company* share so held by such proprietors as aforesaid." By another resolution, *G. Bermingham* and *H. Lake* were appointed trustees for the purpose of holding the assets of the *British Commercial* pending the complete transfer.

Two deeds, dated respectively the 8th of February and 7th of June, 1860, were then made for carrying into effect the amalgamation. The deed of the 8th of February was executed by 174 proprietors of the *British Commercial*, holding, together, 11,014 shares, agreeing to transfer their shares, some to *Bermingham*, some to *Lake*, and some to other trustees for the *British Nation*. *W. Rivington* was one of those who executed this deed. He elected to take cash for his shares, and on the 31st of December, 1860, he executed a transfer of his 200 shares to *Bermingham*, receiving the consideration money, £250, out of the transferred assets of the *British Commercial*. The transfer was registered in the proprietors' ledger of the *British Commercial*. In February, 1861, *W. Rivington*, in answer to an inquiry made by him, was told by the secretary of the *British Commercial* that in a few days the memorial of the transfer would be inrolled in Chancery. He was afterwards told that the transfer had been registered. The memorial was, however, not inrolled until February, 1868. *W. Rivington*, after the date of his transfer, was never treated as a proprietor of the *British*

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Statement.

Commercial, though the *British Commercial* carried on business and issued policies until March, 1862, and paid claims until March, 1863, when its office was closed. By a deed dated the 31st of December, 1864, made in pursuance of a resolution of the directors of the *British Commercial*, the assets of that company were transferred to the *British Nation*, and then the memorials of the transfers were inrolled as above mentioned.

By an order dated the 19th of July, 1872, the *British Commercial* was wound up, and on the 18th of January, 1872, the *British Nation* went into voluntary liquidation; and both liquidations were proceeding under the *European Assurance Society Arbitration Acts*, 1872, 1873, and 1875. The liabilities of the *British Commercial* in respect of policies and contracts existing on the 31st of December, 1860, were about £176,000, and it had no funds or assets if *William Rivington* and the persons in relation to whom his case had been taken as a representative case were not liable to contribute.

Lord *Westbury*, as arbitrator under the Acts, decided that the claims of the policy-holders in the *British Commercial* continued in force against that company, he appearing to be of opinion that the amalgamation was ineffectual. The liquidators of the *British Commercial* then sought to make persons in the position of *Rivington* liable to contribute, and both Lord *Westbury* (1) and Lord *Romilly*, as arbitrators, held that Mr. *Rivington* was not liable to contribute.

A special case was then stated by the arbitrator, and the question whether *William Rivington* ought to be settled on the list of contributories to the *British Commercial* was submitted to the Court of Appeal.

Argument.

Higgins, Q.C., *Cookson*, Q.C., and *Romer*, for the official liquidators:—

We say, first, that *Rivington* must be treated as still the holder of the 200 shares, notwithstanding the transfer to *Bermingham*: but even if the transfer is good, he is still liable in respect of all contracts which then existed. Under the *Companies Act*, 1862, s. 200, any person who is liable at law or in equity is a con-

(1) See Eur. Ass. Soc. Arb. Mins. vol. i. p. 205.

tributory, if he can by any machinery be reached. The so-called amalgamation has been decided by Lord *Westbury* to be *ultrà vires* and void as against the policy-holders. It follows that all done under it was void, and that the transfer was inoperative as against the policy-holders. It could not have been intended to decide that the policy-holders had a good claim against the company, but that there was no company. If these shareholders are not liable, there is nothing on which the policy-holders can come for their £176,000. This transfer was a direct violation of the contract between the policy-holders and the company. The policies are in the usual form, making the assets of the company alone liable, and then the shareholders, by assigning their shares, take away the assets. In the deed of settlement of this company there is not, as in other cases, any power to amalgamate. No doubt there are in the deed the usual provisions for transfers, but not for such transfers as these, which virtually put an end to the company. It is a mere scheme, and the transfers are not *bonâ fide.*

[JAMES, L.J.:—We are dealing with *Rivington's* case only. He had a clear right to sell to *Bermingham,* and how is his right affected by other shareholders also selling to *Bermingham?*]

He was not, in fact, paid by *Bermingham,* it was merely a return of capital. The real purchaser was the *British Nation.*

[LORD CAIRNS, L.C.:—If I am a shareholder in *A.* company, and *B.* company wishes to buy my shares, but is not able to hold them, is it an objection to my transferring them to a trustee for the *B.* company that certain shareholders in the *B.* company object?]

If the thing had been done directly it would have been void: *Stace and Worth's Case* (1); *Imperial Bank of China* v. *Bank of Hindustan* (2); and how can it be good when done indirectly? Such a transaction can be set aside after any length of time. Moreover the memorial was not inrolled until after the company was dissolved and had ceased to carry on business, and the inrolment was therefore void: *Lee's Case* (3). If this company was still in existence, the policy-holders would recover by compelling the

(1) Law Rep. 4 Ch. 682. (2) Law Rep. 6 Eq. 91.
(1) Reilly, Alb. Arb. Cas. p. 1.

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directors to make calls. It is not exactly true that the Court has to deal with this case alone. The arbitration is for the purpose of winding up these companies and distributing the assets; so that to some extent the cases must be considered together. He, with others, covenanted to transfer his shares. The Court must look at the whole transaction.

Sir *H. Jackson*, Q.C., and *Millar*, for Mr. *Rivington*, were not called upon.

Judgment.

LORD CAIRNS, L.C.:—

This case appears to me exceedingly clear. In my opinion we have not anything to do but to administer justice between Mr. *Rivington* and those who are making a demand upon him.

What effect the decision one way or the other will have upon the general winding-up of the companies concerned, what difficulties it may occasion—although we may regret the difficulties—are considerations which cannot affect the decision at which we ought to arrive in this particular case.

At the time of the winding-up was Mr. *Rivington* a person who could be called a member of this company in the sense of being liable to contribute to its debts and liabilities? If he was a shareholder of the company, and continued a shareholder of the company, he would, of course, be so liable. If means were provided by which he, although formerly a shareholder of the company, could effectually transfer his shares, and discharge himself from liability before the winding-up, and he had pursued and adopted those means properly and without fraud, then he would cease to be a shareholder in the company, and no longer be liable to contribute.

What are the facts of this case?—[His Lordship then read the original proposal for amalgamation, observing that there was no intention indicated of doing anything whatever other than that which was lawful or was to be made lawful by proper steps, and in order to accomplish that end—which was to be a lawful end—there was to be a proceeding by way of buying the shares of those who would sell them. His Lordship then read the circular and the resolutions, and continued:—]

Now, I wish to say that, in my opinion, a transaction of this kind in a company where the shares are saleable and transferable is a perfectly legitimate transaction if it is carried out in a legitimate way. One company says to another: "We wish to acquire your business, and we propose to do it in a lawful way; and, introductory to and auxiliary to the final amalgamation and union, we wish to begin by buying at a fixed price the shares of those who will sell." That is, in my judgment, a legal and proper transaction. It may lead to what is improper, if, subsequently, without taking the steps which are necessary to effect the complete amalgamation, the assets are handed over in breach of trust or in breach of faith; but the inception of the transaction, as I have described it, appears to me to be perfectly free from objection.

Then, the meeting having been held, a deed is executed on the 8th of February, 1860, by shareholders holding 11,014 shares, agreeing to sell the shares, some to *Bermingham*, some to *Lake*, and some to other persons, who were to be persons nominated, as is clear and obvious, to hold them on behalf of the *British Nation*. That, of course, was not the actual transfer of the shares; it was only an agreement to transfer. No notice of the names of the transferees was given formally; no notice was necessary, because the names of the transferees were proposed with the concurrence of the shareholders whose shares were to be transferred. Then on the 20th of February, 1860, Mr. *Rivington* executed that deed of the 8th of February in respect of his 200 shares. He appears to have elected to take cash for his shares in the *British Commercial* in place of taking corresponding shares in the *British Nation*. Then on the 31st of December, 1860, that is, at the close of that year, he executed the usual formal transfer of his 200 shares to *Bermingham*. The case adds to that statement that the sum paid to Mr. *Rivington*, namely, £250, was paid out of the transferred assets of the *British Commercial*. But the case does not state, and I find no evidence whatever, that it was known to Mr. *Rivington* from what source that money was derived; and the inference which I should draw from every other statement in the case, and every document in it, is, that he did not know. And he would not suppose that it was paid out of the transferred assets,

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but he would suppose that it was paid by those for whom *Bermingham* was trustee, namely, the *British Nation*, out of their own funds.

Then I find it stated that Mr. *Rivington's* transfer to *Bermingham* was registered in the proprietors' ledger of the *British Commercial* under date the 31st of December, 1860, that is to say, in the ledger of his own company. He appears to have been very vigilant to have everything done that was necessary to complete the transaction, for on the 21st of February, 1861, he received a letter from the secretary of the *Commercial*, in answer to an inquiry from him, stating that the registration of the shares lately held by him was then being completed, and that in the course of a few days the memorial of the transfer would be inrolled in the Court of Chancery. He makes a further inquiry in April, and gets another answer on the 16th of that month, by which the secretary tells him that the transfer of the shares lately held by him in the *British Commercial* had been registered. If that means registered in the proprietors' ledger, it was an accurate statement, but if it meant a memorial had been inrolled, it was inaccurate, for no memorial was inrolled in 1861. But in February, 1865, the transfer by *Rivington* was, under the local and personal Act, inrolled in the Court of Chancery. The case further finds that Mr. *Rivington* "after the date of his transfer never in any way acted or was treated as a proprietor of the *British Commercial*, and was not in any way consulted on or made aware of any of the deeds or transactions hereinafter mentioned, executed, or occurring after the date of such transfer."

Now, was there anything done at or about the time when this transfer was contemplated which, even if had been exposed to the light of a Court of Equity, could then have been held a breach of trust? Nothing whatever that I can find. I find in the deed of the 31st of December, 1864, which was the deed which for the first time amalgamated the two companies—a deed, be it observed, made four years after the transfer of which I have been speaking—this recital: "That divers moneys, stocks, funds, annuities, shares, and securities now owing or belonging to the *British Commercial Company*, are now vested in the parties hereto of the second part as trustees of the company, and whereas it being found that the continuance

of the business of the said company separate and apart from the business of the said association, and the severance of the assets of the said company from the assets of the said association were attended with much trouble and expense and were prejudicial alike to the parties interested in the said company and to parties interested in the said association, it was on or about the 30th day of March, 1863, considered desirable that the business and assets of the said company and the said association respectively should be thenceforth amalgamated and united." And accordingly that had been done, though after the deed of the 8th of February, 1860, the business of the *British Commercial* was carried on—was not wound up or transferred—but was carried on as a separate business, and its directors issued new policies down to March, 1862, and paid claims down to March, 1863, after which time its office was closed, and no contract was made or liability incurred by it. Then on the 22nd of December, 1864, an extraordinary court of the directors of the *British Commercial* was held—so that up to that time they were acting—at which it was resolved—"That the existing amalgamation of the business of that company with the business of the *British Nation* is adopted and confirmed, and that the trustees of the company be directed to take such steps, and do such acts, and execute such instruments as might be considered necessary with a view to perfecting such amalgamation and legally vesting the assets of the *British Commercial Insurance Company* in the said *British Nation Life Assurance Association.*"

The proposition then is, that, there being up to the end of 1864 nothing which in the strictest view of a Court of Equity could be held to be a breach of trust, we are to go back four years, and hold that at the beginning of the year 1860 Mr. *Rivington* was affected in some way by that which was done four years afterwards, even if that which was done four years afterwards did amount to a breach of trust, of which I have no means of judging, though I will assume it did. It appears to me, I do not say unwarranted by authority, but contrary to every principle of common justice, to hold that the transaction by which Mr. *Rivington* sold his shares at the beginning of 1860 is to be judged of by anything that took place at the end of 1864, if any breach of trust then took place. I repeat that throughout, whatever ultimately may have been done, there

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RIVINGTON'S CASE.

Judgment.

is the strongest manifestation of purpose to do everything legally, and by proper authority. That alone appears to have come to the knowledge of Mr. *Rivington*, and every step was taken by him in due form according to the provisions of the deed to transfer his shares.

I have only further to refer to the Act of Parliament (10 & 11 Vict. c. lxxxiv). I do not know that it makes much difference. If there had not been a change in the memorial in the Court of Chancery, then it might be said that by reason of the 10th section of the Act Mr. *Rivington* might continue liable to a judgment or execution, because that section says: "Every member whose name shall appear in the last memorial for the time being inrolled shall, notwithstanding any transfer of his or her shares or share, continue liable to all judgments and executions herein mentioned until a memorial of such transfer shall have been inrolled as aforesaid."

It appears to me that, but for this Act of Parliament, it would have been quite enough to have shewn that he transferred his shares according to the deed; the policy-holder, or annuitant, could have had no claim except under the deed. If there had not been an inrolled memorial of the transfer, the Act of Parliament would have subjected him to judgment and execution by reason of a failure in inrolling the memorial. But the memorial was inrolled. Therefore the Act is in his favour as well as the deed.

I think it impossible to hold otherwise than that there has been a valid transfer by Mr. *Rivington*, and that he is entirely free from any liability in the winding-up.

I may add, and it makes it a little stronger, that these contracts make only those shareholders liable who are interested in the company at the time when the claim under the policy arises. However, I refer to the date of the winding-up, and in my opinion there had then been a valid transfer of the shares.

JAMES, L.J.:—

I do not think it necessary to add anything, as the case seems to me so abundantly free from doubt.

BAGGALLAY, J.A., concurred.

Solicitors for Official Liquidators: *Mercer & Mercer.*
Solicitors for Mr. *Rivington*: *Rivington & Son.*

In re EUROPEAN ASSURANCE SOCIETY ARBITRATION ACTS.

C. A. 1876 May 2.

DOMAN'S CASE.

Contributory—Transfer—Inrolment of Transfer—New Laws—Amalgamation—Ultrà vires.

By the deed of settlement of the *A.* insurance company power was given to the directors to call an extraordinary meeting of the company for the purpose of making new laws and regulations. By laws and regulations made accordingly several years afterwards, power was given to the directors to make a junction with any other company. By a private Act of Parliament, shareholders who had executed transfers were to continue liable until their transfers were inrolled in Chancery, but were to be reimbursed out of the funds of the company for all losses sustained in consequence thereof, nor were they to be liable for any debt for which they would not have been liable as partners, nor could anything be recovered from them which could not have been recovered if the Act had not been passed.

With a view to an amalgamation with the *B.* insurance company, the greater number of shareholders in the *A.* company agreed to transfer their shares to trustees for the *B.* company. In the case of one of these shareholders he assigned his shares to a trustee for the *B.* company, but the transfer was not inrolled in Chancery. The *A.* company then ceased to carry on business. Thirteen years afterwards the *A.* company was ordered to be wound up. There were claims by policy-holders whose policies were granted before the alteration in the laws and regulations:—

Held, that though the transfer was not inrolled, it would be useless to make the shareholder a contributory, as he would under the Act receive back from the company all that he paid to it; also, that as his transfer was valid according to the constitution of the company, the Act prevented him from being liable to pay the debts of the company:

Held, also, that as the deed of settlement to which the policy-holders were subject provided for making new laws and regulations, they were bound by these new laws and regulations when made; and therefore,

Semble, that the amalgamation between the companies was not *ultrà vires*.

Statement.

THE *European Life Assurance and Annuity Company* was constituted under a deed of settlement dated the 10th of July, 1820, one of the clauses of which provided that it should be lawful for the board of directors at any time to call an extraordinary general court for the purpose of making new laws and regulations and provisions for the company, or of amending, altering, or repealing any of the existing laws, regulations, and provisions of the

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company by advertising the same. This deed of settlement was altered by a supplemental deed, dated the 1st of February, 1821, and by laws and regulations made in 1848, one of which provided that "a junction of the company with any insurance company or companies, or a dissolution of the company might be determined on by a resolution adopted and confirmed at two successive special general meetings." The company was empowered by an Act (7 & 8 Vict. c. xlviii.) to sue and to be sued, and the clauses of that Act, as to the inrolment of transfers, so far as they relate to the question in this case, are stated in the judgment of the Lord Chancellor.

On the 4th of October, 1837, *John Doman* had acquired 100 £20 shares in the company, £2 paid, of four of which he continued proprietor until the transfer hereinafter mentioned.

In July, 1858, a proposal for an amalgamation was made by the manager of the *People's Provident Assurance Society*, and the proceedings thereon were very similar to those in the amalgamation in *Rivington's Case* (1).

The deed of transfer of the assets of the *European Company* was dated the 8th of December, 1858, after which all premiums were paid to and received by the *People's Provident*. Notices were sent to the proprietors that they could have for their shares either cash or shares in the *People's Provident*. A few proprietors did not act on the notices; but 119 proprietors took cash for their shares, and fifty-four took shares in the *People's Provident*. The exchange was effected by a transfer of their shares to *William Cleland*, the manager of the *People's Provident*, in consideration of £8 a share, and *William Cleland* for a like consideration transferred to the proprietors shares in the *People's Provident* to a like amount. *J. M. Doman* took cash for his shares, and executed a regular transfer deed. The deed was dated the 26th of February, 1859, and by it, in consideration of £32 expressed to be paid by *Cleland* to *Doman*, *Doman* transferred his four shares to *Cleland*. *Doman* was paid by the cheque of *Cleland*, and alleged that he had no knowledge of a resolution of the directors of the *People's Provident* that £10,000 should be placed to the credit of the manager, in order to enable him to pay such of the proprietors as

(1) *Ante*, p. 10.

should require cash. No memorial of the transfer was inrolled in Chancery, and *Doman's* name appeared in the memorial last inrolled as the name of an existing proprietor of the *European Company.*

Statement.

By the *European Assurance Society's Act,* 1859, the name of the *People's Provident* was changed to the *European Assurance Society.*

By an order of the arbitrator in the *European Assurance Society Arbitration Acts,* dated the 20th of January, 1873, the *European Company* was ordered to be wound up. The claims against it were about £275,000, and the assets were under £5000. The shares of the company still stood in the books in the names of the transferees, *W. Cleland* holding 4277.

The policies of the *European Company* were in the usual form, declaring that the funds and property of the company should be "subject and liable (according to the provisions of the deed of settlement of the said company bearing date the 10th day of July, 1820) to pay and satisfy" within three months after proof of the death the sum for which the policy was issued.

Lord *Westbury* and Lord *Romilly,* as arbitrators, both held that the amalgamation between the companies was valid, and Lord *Romilly* held that *J. Doman* could not be made to contribute to the assets of the *European Company* (1).

The arbitrator under the Act of 1875 stated a special case, and submitted to the Court of Appeal whether *J. M. Doman* ought to be settled on the list of contributories to the *European Company,* and, if so settled, whether for all purposes, or for the purpose of contributing to the payment of such of the debts and liabilities as have accrued in respect of policies and contracts entered into before or during his membership and still remaining unsatisfied.

Argument.

Higgins, Q.C., *Cookson,* Q.C., and *Romer,* for the official liquidator:—

In the first place, Mr. *Doman* has never been freed, as his transfer has not been inrolled. The intention of the Act was to make former shareholders liable. Then the amalgamation is void as *ultrà vires.* By the original deed there was no power to amalgamate, and the only power is that alleged to be created by laws and

(1) See Eur. Ass. Soc. Arb. Mins. vol. ii. p. 955.

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regulations made in 1848. But laws and regulations cannot extend to destroy the company, and at all events cannot prevail against policy-holders whose policies are earlier than the laws and regulations. After a policy or an annuity was granted the company could not make any new laws which affected it.

[LORD CAIRNS, L.C.:—In many cases a company which had originally no power to dissolve or amalgamate has held meetings and acquired that power. A policy-holder cannot upset such proceedings if they were taken in good faith.]

Could the company repeal their whole deed, and tell the policy-holders that they held under fresh conditions? If this is good, nothing can ever be *ultrà vires* where there is a power to modify the rules of the company. The company was not registered, and Mr. *Doman* remains liable in spite of the alleged transfer.

Sir *H. Jackson*, Q.C., and *Millar*, for Mr. *Doman*, were not called upon.

Judgment.

LORD CAIRNS, L.C.:—

Up to a certain point this case is the same as *Rivington's Case* (1), which we have just decided. I will assume, in the first place, that the amalgamation between the two companies was not *intra vires*; that it was *ultrà vires*. Then you have here the case of a shareholder who is admitted to have sold his shares in the manner in which Mr. *Rivington* sold his shares, that is to say, according to the provisions of the deed, to a person approved of by the directors, with, no doubt, the knowledge that the two companies intended to proceed to obtain an amalgamation by whatever means were properly within their powers. Then if there were no Act of Parliament in the case, the case would be the same as *Rivington's Case*, which we have just disposed of, and we should be obliged to hold that the sale and transfer of Mr. *Doman's* shares was valid to exempt him from any liability to contribute. Then does the Act make any difference? This Act provides, in section 23, "That until the memorial by this Act required to be inrolled in the event of any director, trustee, secretary, or shareholder of the company, ceasing to be such director, trustee, secretary, or

(1) *Ante*, p. 10.

shareholder has been inrolled, the persons whose names shall appear in the then last inrolled memorial, and their legal representatives shall be liable to all legal proceedings under this Act as existing shareholders of the company."

There was no memorial inrolled in this case, and if the section had stopped there, it would appear to fix the liability upon Mr. *Doman* as the person mentioned in the memorial inrolled, but the section goes on to say: "and shall be entitled to be reimbursed out of the funds or property of the company for all losses sustained in consequence thereof,"—a proviso which appears to me to shew that the object was simply to give a nominal Defendant against whom the Plaintiff might proceed, for the purpose of enabling the Plaintiff to reach the funds of the company, not for the purpose of extracting money out of the pocket of a shareholder to his loss, provided there were any funds of the company which could reimburse him. If there were not funds of the company to reimburse him, perhaps he would not be reimbursed; but shilling for shilling that he pays, if there be a second shilling to reimburse him, he is entitled to be paid that shilling from the funds of the company. Therefore it would be an idle ceremony, if he is entitled to be reimbursed, shilling for shilling, to make him in the winding-up put a certain number of pounds into the funds of the company, when he would be immediately entitled to take back those pounds which he had so put in. But in addition to that there is the 9th section, which seems to say that if you try to go behind the mere fact of the person being inrolled, and therefore liable to be sued under this Act, he would be entitled to say, if he is a person who has ceased to be a shareholder, that he is not liable. The 9th section enacts that he is not to be liable "for the payment of any debt for which any such judgment, decree, or order shall have been so obtained, for which he would not have been liable as a partner in case a suit had been originally brought against him for the same. . . ." And "that this Act shall not be deemed to enable any party to a suit to recover from an individual shareholder of the company, or any other person whomsoever, any other or greater sum than might have been recovered if this Act had not been passed."

Therefore, under that section, again, if he could shew that he had ceased to be a shareholder of the company by a transfer valid

C. A. 1876 DOMAN'S CASE. Judgment.

according to the deed of the company, he would be authorized to say, you must not take any money from me, which you could not have obtained if the Act had not been passed. Therefore, as it seems to me, the case is the same as *Rivington's Case* up to the point of the Act, and that there is nothing in the Act to make any difference and to render Mr. *Doman* liable to be a contributory in the winding-up of the company.

Now, I have assumed in what I have said that the transaction of amalgamation was *ultrà vires*, and perhaps it is not necessary to do more than assume that; but I doubt very much whether it was *ultrà vires*. I am inclined to agree with what appears to have been the impression of Lord *Westbury*, that it was *intrà vires*. It is, no doubt, a very strong thing, after policies have been effected with a company, that that company should obtain power to transfer its business and assets to another company. But, at the same time, if policy-holders will enter into dealings with a company whose contracts may be said to be subject to the provisions of the deed of settlement of the company, and if the deed of settlement of the company, in the most general terms, authorizes a number of general meetings to make alterations in the constitution of the company, and new laws and regulations for the company, then so long as those laws and regulations are made in good faith—because the cases which have been suggested, such as absolving of the company from all liability, would not be in good faith—I doubt very much whether the policy-holders, entering into the contracts they have entered into, are not bound by the alterations and by the new laws and regulations. If so, this case is still stronger; because there clearly was an alteration in the laws and regulations of the company, and new laws and regulations were passed, which authorized them upon certain terms and certain conditions to amalgamate with another company. If, therefore, the transaction was *intrà vires*, as Lord *Westbury* supposed it to be, the case will be stronger against Mr. *Higgins'* client. I do not think it necessary to decide that point, because, even assuming it was *ultrà vires*, I think the argument of Mr. *Higgins* must fail, and that we must answer the special case by saying that the decision which declined to put Mr. *Doman* on the list of contributories was the proper decision.

JAMES, L.J.:—

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I am of the same opinion. I may repeat what I said in a former case, that I do not think we ought to be astute to find grounds for upsetting amalgamations; because, if the thing is really done honestly, the amalgamation of two weak companies is far from being a prejudice to the person who claims. It is like putting together two weak hives to make a strong one, and the company consisting of two weak companies might be a very strong company, and capable of carrying on its business at a profit when the two separately might come to an end. I do not think we ought to seek reasons that it was *ultrà vires* or that it was a fraud.

BAGGALLAY, J.A.:—

I am of the same opinion.

Solicitors for Official Liquidators: *Mercer & Mercer.*
Solicitors for Mr. *Doman: Wood, Street, & Hayter.*

MELUISH *v.* MILTON.

C. A. 1876 V.-C. H. *Jan.* 19. C. A. *April* 26 28; *May* 6.

[1874 M. 155.]

Will of Personal Estate—Fraud—Exclusive Jurisdiction of Court of Probate.

A testator made a will giving all his property to his wife, and appointing her sole executrix. She proved the will. The heir-at-law and sole next of kin filed a bill to have her declared a trustee of the property for him, on the ground that she had fraudulently concealed from the testator the fact that she was not his lawful wife, as she had a former husband living:—

Held, that the Court of Chancery had no jurisdiction to entertain the case, which was within the exclusive jurisdiction of the Court of Probate; and that the case was not distinguished from *Allen* v. *M'Pherson* (1) by the fact that the lady had not asked the testator to make a will in her favour.

Statement.

THIS was an appeal by the Plaintiff from a decision of Vice-Chancellor *Hall*, who had dismissed the bill with costs.

On the 23rd of January, 1850, the Defendant *Maria Milton*,

(1) 1 H. L. C. 191.

C. A. 1876 — MELUISH v. MILTON. — Statement.

then *Maria Dunster*, spinster, intermarried with the Defendant *John Milton*. On the 10th of September, 1854, after having lived for many years separate from her husband, she went through the ceremony of marriage with *F. E. Edwards*, with whom she lived as his wife till his death in September, 1864, after which she, on the 30th of May, 1870, went through the ceremony of marriage with *Henry Meluish*, a friend of *Edwards*, who had known her as Mrs. *Edwards*.

H. Meluish, on the 23rd of August, 1870, made his will, by which he gave all his property, real and personal, to the Defendant *Maria Milton*, by the description of his dear wife *Maria Chapple Meluish*, and appointed her his executrix. He died on the 4th of June, 1871, possessed only of personal estate, and on the 26th of June, 1871, she proved the will.

The bill was filed by *William Meluish*, the sole next of kin and heir-at-law of the testator, alleging that *Maria Milton*, at the time when she went through the ceremony of marriage with the testator, knew that *John Milton* was living; that the testator was not aware of it; that she fraudulently concealed it from him, and induced him to believe, and he did believe, that she was his lawful wife. The bill alleged that the dispositions of the will in her favour were obtained by the fraudulent assumption on her part of the character of the testator's wife; and it prayed that the devise and bequest to her might be declared void in equity, and that she might be declared a trustee for the Plaintiff of the real and personal estate.

It did not appear that *Maria Milton* ever took any means to induce the testator to make a will in her favour, nor that she even knew of the will till after his death. In opposition to the case made by the bill, she made the case that the testator when he married her was fully aware of her having been married to *Milton*, and of his having been alive long after she separated from him, and knew that there was no proof of his death.

The case came on for hearing before Vice-Chancellor *Hall* on the 19th of January, 1876.

Dickinson, Q.C., and *B. B. Rogers*, for the Plaintiff.

Ince, Q.C., and *A. Whitaker*, for the Defendants.

[*Kennell* v. *Abbott* (1), *Rishton* v. *Cobb* (2), *Segrave* v. *Kirwan* (3), *Re Petts* (4), *Wilkinson* v. *Joughin* (5), and *Allen* v. *M'Pherson* (6), were referred to.]

HALL, V.C.:—

The question here is whether, upon the circumstances of this case, the devisee and legatee under the will of the testator *Meluish*, whereby he gives all his property to his dear wife, *Maria Chapple Meluish*, absolutely, and appoints her sole executrix, is disentitled in this Court to claim the benefit of that disposition, by reason of her having, as is alleged, concealed from her intended husband that which she ought to have communicated to him. The law to be applied to cases of this description is stated by Lord *Alvanley* in *Kennell* v. *Abbott*, which was adopted and referred to in the case of *Rishton* v. *Cobb* (7), in which Lord *Cottenham* says: "When a legacy is given to a person, under a particular character, which he has falsely assumed, and which alone can be supposed the motive of the bounty, the law will not permit him to avail himself of it, and therefore he cannot demand his legacy." Afterwards he said that, before applying this rule, the Court must be satisfied that the assumed character was the motive for the bounty. It was considered in *Kennell* v. *Abbott* to be quite clear that a fraud had been committed, and the like observation applies to *Wilkinson* v. *Joughin*. We must attend in all these cases to the circumstances of the particular case. Now, in this case, I think it impossible for the Court not to conclude upon the evidence that the question of this lady being or not being a married woman was, previously to the ceremony of marriage being gone through between her and *Meluish*, matter of consideration and discussion between them. She had been living for a number of years as the wife of a friend of *Meluish*, and he had known her in that character; he desired to marry her, and the question whether *Milton* was still living was discussed. The statements made in reference to that in the answers of the Defendant, Mrs. *Milton*, certainly

(1) 4 Ves. 802.
(2) 5 My. & Cr. 145.
(3) 1 Beatt. 157.
(4) 27 Beav. 576.
(5) Law Rep. 2 Eq. 319.
(6) 1 H. L. C. 191.
(7) 5 My. & Cr. 150.

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have shifted, and her evidence in some respects is inconsistent with the statements in those answers. In her first answer she said that she had not heard or seen anything of him for nineteen years. The bill was then amended, and a particular date was fixed for her having seen *Milton*, and it was charged that she saw *Milton* on other occasions, but the result of the evidence is, I think, certainly that only one interview was proved to have taken place, and that in 1866; and my conclusion on the evidence is that *Meluish*, before the marriage, was informed that *Milton* had been seen after the death of *Edwards*. In that state of things the testator married this lady. Whether she told him that she had not seen *Milton* since 1862, or whether she told him that she had not seen him except on one occasion, which was after the death of *Edwards*, is not very material; he chose to marry a lady who undoubtedly had been married to another man of whose death he was aware that there was no certain evidence. Assuming that he was told that the last time when *Milton* had been heard of was in the year 1862, the testator still must have gone through the marriage ceremony with the knowledge that it was not certain whether the first husband was living or dead, and when, after this, the parties had lived together as man and wife for some time, I do not think it would be safe to consider that the character of lawful wife was the motive, and, as Lord *Cottenham* says, the only motive, for the gift. A man who under these circumstances was living with a woman as his wife might very well intend that the property should go to her, although she in fact might turn out not to be his lawful wife. I cannot consider that in that state of circumstances the case is brought within the case of *Kennell* v. *Abbott* (1). It seems to me, therefore, that the fraud is not established so as that I can, upon this bill, declare the Defendants trustees of anything for the Plaintiff. I have therefore said nothing whatever as to the jurisdiction which has been assumed by this Court in the four cases which have been referred to. Three out of the four were before *Allen* v. *M'Pherson* (2), and that case was not cited in the fourth, so that the matter was not discussed. I give no opinion as to whether there would be jurisdiction in this case, or whether the case is covered by *Allen* v. *M'Pherson*, but, assuming that I have juris-

(1) 4 Ves. 802. (2) 1 H. L. C. 191.

diction, I hold that the Plaintiff has failed to establish his case, and that therefore the bill must be dismissed, and dismissed with costs.

The Plaintiff appealed from this decision. The appeal came on to be heard on the 26th of April, 1876.

Argument.

Dickinson, Q.C., and *B. B. Rogers*, for the Appellant:—

We contend that the case is governed by *Kennell* v. *Abbott* (1), and that the Vice-Chancellor has taken an erroneous view of the evidence in holding it to establish that the testator went through the ceremony of marriage with Mrs. *Milton* knowing that there was a doubt whether she was not the wife of another man. As regards the jurisdiction, the case is distinguishable from *Allen* v. *M'Pherson* (2). We are not seeking to affect the legal estate, but only the beneficial interest. The Court ought not to disclaim jurisdiction unless it is clear that the Probate Court has it. Now, the only fraud which appears to be cognizable in the Probate Court is fraud in obtaining the will: *Williams* on Executors (3). Here there was no such fraud. Mrs. *Milton* did not persuade the testator to make the will—she never even knew of it. He went to his legal adviser and had it prepared without consulting her. How, then, is the Court of Probate to say that it is not his will?

[JAMES, L.J.:—If the bequest was not obtained by fraud, where is your equity?]

On an implied condition that the legatee was his legal wife.

[JAMES, L.J.:—According to that, it would make no difference if the lady was innocent, and married in the reasonable but mistaken belief that she was a widow, and if the testator knew all the circumstances.]

At all events, it does not appear that the Court of Probate can take cognizance of any fraud but a fraud in obtaining the instrument.

[JAMES, L.J.:—If the instrument is a fruit of fraud, it was obtained by fraud.]

(1) 4 Ves. 802. (2) 1 H. L. C. 191.
(3) Part i., Book vi., chap. i.

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Segrave v. *Kirwan* (1) supports our case.

[JAMES, L.J.:—There the fraud did not affect the appointment of the executor.]

Lord *Cottenham's* remarks in *Rishton* v. *Cobb* (2) are in our favour.

[MELLISH, L.J., referred to the statement of *Gilbert*, C.B., cited in *Allen* v. *M'Pherson* (3)].

THEIR LORDSHIPS expressed themselves not satisfied as to the result of the evidence, but ordered the case to stand over, that they might consider whether *Ince*, Q.C., and *A. Whitaker*, for the Respondents, would be called upon as to the question of jurisdiction.

Judgment, C. A. James, L.J.

May 6. JAMES, L.J.:—

The Plaintiff in this case is the next of kin of the testator, Mr. *Meluish*. The Defendant is a lady who has propounded in the Probate Court and obtained probate of an instrument whereby Mr. *Meluish* left all his property, real and personal, to her, describing her as his dear wife, and appointed her his sole executrix. The Plaintiff alleges that she not only was not the lawful wife of Mr. *Meluish*, but that she well knew at the time when she went through the ceremony of marriage with *Edwards* that her husband, the Defendant *Milton*, was still living, and that she also well knew him to be living when, under the name of *Maria Chapple Edwards*, she went through the ceremony of marriage with Mr. *Meluish*; that neither at the time of the marriage nor afterwards was Mr. *Meluish* aware of her having a husband living; that she fraudulently concealed the fact from him, and then, having fraudulently induced him to regard her as his lawful wife, obtained this will; and the prayer is that the devise and bequest to her may be declared void in equity, and that she may be declared a trustee for the Plaintiff. The Vice-Chancellor came to the conclusion that the Plaintiff had failed to prove his allegations. The Defendant has taken a preliminary objection that the Court of Chancery had

(1) 1 Beatt. 157. (2) 5 My. & Cr. 145.
(3) 1 H. L. C. 219.

no jurisdiction to entertain such a suit. No doubt, until the decision in *Allen* v. *M'Pherson* (1), a good deal might have been said, and was said, and even decided in favour of the jurisdiction of the Court of Chancery to entertain such a suit and to relieve against such a fraud, and in that very case two eminent Judges of the Court of Chancery maintained that jurisdiction. But their eloquence and learning did not prevail with the House of Lords, which came to the conclusion that in such a case jurisdiction was to be exercised exclusively by the Court of Probate. That case was in many respects the same as this; but there is a distinction between them which is not in favour of the jurisdiction of the Court of Chancery in the present case. In *Allen* v. *M'Pherson* the instrument complained of was a codicil by which the testator revoked beneficial interests given by his will, without in any way affecting the legal title of the executor. Here the alleged fraud, if it affects anything, affects the whole will, including the title of the executrix. In that case the codicil was alleged to have been obtained by fraudulent misrepresentations, and as the case came before the Court on demurrer, these allegations were to be taken as true, yet the House of Lords held that the Court of Probate alone had jurisdiction. The doctrine laid down was in substance this: "A will obtained by fraud is not the will of the testator. A probate which is not recalled is conclusive proof in all other Courts that the will is his will. Therefore no other Court can listen to the allegation that the will was obtained by fraud." We are bound by that decision, and are bound to give full effect to it. I cannot see any distinction between that case and the present. There the case made was that a codicil had been obtained by fraudulent misrepresentations; here, that the whole will has been so obtained. A distinction was attempted to be made on the ground that the lady had not asked for the will, and that the fraud consisted only in inducing the testator to believe in her *status* as his wife; but it appears to me that this argument cannot be sustained. Either the fraud was *causa causans* of the will, or it was not. If it was, then the will was obtained by fraud, and the case is within the exclusive jurisdiction of the Court of Probate; if it was not, then no ground is laid for the interference of any Court.

(1) 1 H. L. C. 191.

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We therefore dismiss the appeal on the ground that the Court of Chancery had no jurisdiction to entertain the case; the dismissal being without prejudice to any proceedings in the Probate Division. We give no opinion as to the result of the evidence, as the Court had no jurisdiction to entertain the question.

Mellish, L.J.

MELLISH, L.J.:—

I am of the same opinion. The case of *Allen* v. *M'Pherson* (1) clearly decided that the Ecclesiastical Court had exclusive jurisdiction to set aside the whole or any part of a will of personal estate on the ground of fraud, and whatever respect we entertain for the opinions of the two eminent Judges who dissented, we must look to the decision of the majority. Lord *Campbell* there observed that the Court of Chancery had no jurisdiction over wills of personal property, and could not set aside a probate of personal property: if, then, a bill could be filed to make the legatee a trustee for another person on the ground of fraud, that would be done indirectly which the law does not allow to be done directly. Is not this in substance a bill to set aside a probate for fraud? There are two facts which the Plaintiff must prove: first, that this lady fraudulently concealed from the testator the fact that she had a husband living; and, secondly, that he made his will in the faith that he was legally her husband. If those facts are proved, then it is proved that the will was obtained by fraud. If it was not obtained by fraud, there is no ground for interfering with it. The only ground to be alleged for the jurisdiction is this, that there may be a difference between what the Court of Probate considers fraud and what the Court of Chancery considers fraud. It would be a mischievous thing to hold that there is such a difference, unless the authorities compel us to do so, and I cannot find from the cases that any such difference exists. Then it was urged that the Court of Probate could not refuse probate for fraud, unless the fraud was committed for the purpose of obtaining the will; and no doubt in *Allen* v. *M'Pherson* the fraud was of that nature, the residuary legatee, knowing himself to be such, having made fraudulent representations for the purpose of getting legacies revoked. Here it is said that the fraud was not committed for the

(1) 1 H. L. C. 191.

purpose of obtaining the will. I cannot agree in this. Though we term the conduct alleged in this case fraudulent concealment, it is equivalent to fraudulent misrepresentation. When the lady went through the ceremony of marriage with the testator, she in effect represented to him that she was capable of becoming his lawful wife, and every day while they were living together she must be taken as continuously representing to him that she was his lawful wife. If at the same time she knew that her former husband was alive, this was what the Court would take notice of as a fraudulent misrepresentation. For what purpose were these representations made? To obtain all the benefits of the position of the testator's lawful wife, and a testamentary provision in case she survives her husband, is one of the advantages which a wife most naturally expects. The misrepresentations must, therefore, be treated as made, among other things, for the purpose of obtaining a will in her favour, and it makes no difference whether this particular advantage was actually present to her mind or not. This, therefore, is a suit to set aside a will as having been obtained by fraud, and I am of opinion that there is no difference between the Court of Chancery and the Court of Probate as to what constitutes fraud. We, therefore, must decide this case on the ground that the Court of Chancery had no jurisdiction, and we ought not to give any opinion as to the effect of the evidence; indeed I think that we ought to have heard the case out on the question of jurisdiction before we heard any of the evidence, for our giving an opinion on the merits might prejudice the case on its coming before the proper tribunal. At the time when *Allen* v. *M'Pherson* (1) was decided much weight might have been given to the argument that the Court of Chancery had better means of inquiring into fraud than the Court of Probate; but that is not so now, for the Probate Division has the same means of arriving at the truth as the Chancery Division. I think, therefore, that now convenience is in favour of the law as laid down in *Allen* v. *M'Pherson*, for there is no convenience in allowing parties to keep back a defence which they might urge in the Court of Probate and then raise it elsewhere, and still less is it desirable to enable them to try the same matter twice over in different Courts.

(1) 1 H. L. C. 191.

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Judgment, C. A. Baggallay, J.A.

BAGGALLAY, J.A.:—

I agree with the judgments of the Lords Justices. Whether the Vice-Chancellor came to a correct conclusion on the facts, I give no opinion. The case may have to be tried in another Court, and ought to go there without being prejudiced by anything that is said here. The decision in *Allen* v. *M'Pherson* (1) is binding on us, and I think that the exclusive jurisdiction of the Court of Probate in such cases is supported by convenience as well as by authority.

Solicitors: *Prior, Bigg, Church, & Adams; E. Doyle.*

C. A. 1876 V.-C. H. *March* 17. C. A. *May* 28.

PILE *v.* PILE.

[1873 P. 135.]

Ex parte LAMBTON.

Compensation under Lands Clauses Act—Mortgagor and Mortgagee—Compensation for Loss of Profits—Goodwill.

The owner of business premises mortgaged them with the machinery and fixtures. A railway company gave notice to take part of the premises for their railway, but before the price was fixed the mortgagor died, and the mortgagees entered into possession of the property. A suit was instituted for the administration of the mortgagor's estate, which proved to be insolvent, and a receiver was appointed, who, with the consent of the mortgagees, carried on the business. Arbitrators and an umpire were appointed to fix the compensation money payable by the company. The umpire awarded a sum of £11,950, of which he certified that he had awarded £2800 in respect of the loss of profits in carrying on the business. The executors claimed the £2800 as belonging to the mortgagor's estate, to be divided among his general creditors:—

Held (affirming the decision of *Hall*, V.C.), that the £2800 was in the nature of compensation for the value of the goodwill of the business, which passed with the premises; and that the whole of the sum of £11,950 belonged to the mortgagees.

Statement.

THE question in this case arose in a suit for the administration of the estate of *William Pile.*

On the 3rd of November, 1869, Sir *W. Williams* demised to *William Pile* a ship and graving dock, and premises, at *Monkwearmouth,* in the county of *Durham,* for twenty-one years, at the

(1) 1 H. L. C. 191.

rent of £340. By an indenture of mortgage, dated the 7th of November, 1872, *W. Pile* assigned to Messrs. *Lambton & Co.*, bankers at *Sunderland*, among other things, all the hereditaments and premises comprised in the lease, and also all buildings, engines, machinery, implements, utensils, fixtures, real or personal property which might be erected or placed on the premises during the continuance of the security, either in lieu of or in addition to those then existing thereon, for securing the repayment of £40,000, or the balance of his account not exceeding £60,000, with interest. The mortgage contained powers of entry and of sale in case of default in payment of the mortgage debt or interest. On the 27th of January, 1873, the *North Eastern Railway Company* gave notice to *W. Pile* to purchase the graving dock and certain buildings thereon, being part of the premises comprised in the lease. On the 12th of February, 1873, *W. Pile* gave notice to the company that he claimed £35,000 for the purchase of his interest in the premises, and that if they refused to pay him that sum, he required the amount of compensation to be settled by arbitration.

W. Pile died on the 5th of June, 1873, having appointed the Defendants his executors.

A few days after the death of *W. Pile*, Messrs. *Lambton & Co.* took possession of the graving dock and premises, under the provision in their mortgage deed, and on the 11th of June they gave notice to the railway company that they were mortgagees in possession of the premises, and desired to have the amount of their compensation settled by arbitration.

A suit was instituted by some of the persons beneficially interested under *W. Pile's* will for the administration of his estate, and on the 31st of July, 1873, the usual decree for administration was made. The executors were not able to carry on the testator's business, having no funds for that purpose, but, with the consent of the mortgagees, a receiver was appointed, and the premises were let to persons who completed the contracts which *W. Pile* had at the time of his death.

By an appointment in writing, dated the 30th of March, 1876, the company nominated an arbitrator to act on their behalf, and the executors and the mortgagees, by the same instrument, concurred in recommending another arbitrator on their behalf "to settle

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the amount of the compensation to be paid for the said lands so required as aforesaid, and for the damage which might be sustained by reason of severance, or by reason of the execution of the works, or of the exercise, as regarded such lands, of the powers vested in the said company by their said Act."

Statement.

The two arbitrators appointed an umpire, to whom the matter was ultimately referred. He made his award, dated the 1st of September, 1874, and thereby awarded that the compensation to be paid by the said company to the executors and Messrs. *Lambton & Co.* "for the leasehold interest of the parties in the said lands and hereditaments so required as aforesaid, and for the damage that might be sustained by them by reason of the execution of the works for which the said lands and hereditaments were so required as aforesaid, or of the exercise, as regarded such lands and hereditaments, of the powers vested in the said company by the said Acts, and for the trade profits of the executors, and for the machinery on the said lands and hereditaments, should be the sum of £11,950, which should be due and payable from the said 5th of September, 1875."

The sum of £11,950 was accordingly paid into Court by the company, and the premises were assigned to them.

The umpire subsequently, at the request of the parties, gave a certificate as follows: "The question of trade profits was argued before me, and their annual amount was finally agreed between the parties, and put before me as an item to form part of the total amount awarded, and such item was therefore specially named by me in my award. It was placed by me at £2800, and was given in respect of the trade profits which would have accrued if the premises had not been taken by the *North Eastern Railway Company*."

Messrs. *Lambton*, to whom upwards of £50,000 was due for principal and interest, now presented their petition, claiming that the whole of the compensation money should be paid to them in part payment of their debt.

Argument.

Hastings, Q.C., and *Oswald*, for the Petitioners, referred to *Chissum* v. *Dewes* (1), and *In re Harper and Great Eastern Railway Company* (2).

(1) 5 Russ. 29. (2) Law Rep. 20 Eq. 39.

Eddis, Q.C., and *T. Stevens*, for the Plaintiffs, contended that the sum of £2800 belonged to the creditors, as part of the estate of the mortgagor, and was divisible among the general body of the creditors.

Dickinson, Q.C., and *J. T. Humphry*, for the executors.

HALL, V.C.:—

I am of opinion that the sum of £2800 must be considered as belonging to the mortgagees, and not to the executors. The sum in question is part of a large sum awarded to be payable under the following circumstances: The late Mr. *Pile* was lessee of certain premises for twenty-one years. This lease included the machinery, fixed and moveable. The railway company gave notice to take part of the premises which were in the lease. The usual proceedings took place. Mr. *Pile* made a claim for compensation in respect of his interest in the premises, that is, what was included in the notice. Mr. *Pile* having died, the proceedings were carried on; arbitrators were appointed on either side, and an umpire. All that had reference, *primâ facie*, to what the notice was given for, and what was included in the claim and in the appointment of the arbitrators and the umpire. Before the arbitrators and the umpire they seem to have included, at all events, the machinery; possibly, as to that part which was unfixed, there might have been some question whether it was intended to be included in the arbitration and award. However, all parties seem to have acquiesced that the moveable machinery should be taken as included. Then that being so, all that unquestionably belonged to the mortgagees. The question is, whether the sum awarded for trade profits also belongs to the mortgagees. Supposing for a moment there was no difficulty arising from the fact of this property being only part of the property in the mortgage, it would seem to me that I could not distinguish this case from the case of *Chissum* v. *Dewes* (1). The mortgage of the lease of a property of this description must carry along with it everything which would be awarded in respect of that property. Supposing it had not been taken by the company at all, and supposing the mortgagees had come to realize

(1) 5 Russ. 29.

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their security, and had had it sold under a decree of this Court, and had sold the thing as a whole, would not that have carried along with it any sum which might be considered properly payable by the purchaser in respect of his being able to say that he was carrying on the business upon those premises? Mr. *Pile* having died cannot, at all events, make that worse; it may possibly make it somewhat better, because Mr. *Pile* individually would not be in competition with any purchaser, and there would be nothing to sell in respect of the goodwill independently of the premises themselves, but anything which could be called goodwill on the sale by the executors must have gone along with the premises. Then if that be so, if the whole were sold, is it any the less the right of the mortgagees, by reason of part of the property being sold, to claim the value of the goodwill? Certainly not. They are entitled to that which represents trade profits ascertained. With reference to that part being taken, we learn from the umpire that the amount of the annual sum in respect of the trade profits was agreed upon between the counsel, and he, having the means of estimating the sum to be paid in respect of trade profits, awarded £2800 in respect of it. How many years' purchase that represents, or whether it represents more than one year's purchase, we do not know, and it is quite immaterial. Suffice it to say, that was one of the things which he calculated as being within his province as arbitrator in respect of the sale of these particular portions of the premises. That seems to me, therefore, to belong to the mortgagees, and I cannot consider that the mortgagees' rights have been in any way prejudiced or affected under the circumstances by reason of there having been a receiver and manager appointed in this suit with the consent of the mortgagees. That was to be taken to be entirely without prejudice to their rights.

C. A. From this decision the Plaintiffs appealed. The appeal was heard on the 28th of May, 1876.

Argument. *Eddis*, Q.C., and *T. Stevens*, for the Appellants:—

Both parties are bound by the certificate of the umpire. But if not, the Court will look at the certificate of the umpire to see on

what grounds he proceeded, and will divide the compensation between the parties according to their interests. The sum of £2800 was awarded by the umpire in respect of future loss of trade profits by those who were carrying on the business. *Chissum* v. *Dewes* (1) was an ordinary case of the sale of business premises with the goodwill. In the present case the company only took part of the premises in which the business was carried on, and the business may still be carried on, although with a loss from severance. The rights of the parties must be ascertained by their position at the time when notice to treat was given. At that time the mortgagor was in possession, and the mortgagees, in fact, never carried on the business, but it was carried on after the mortgagor's death by the receiver of the Court on behalf of the mortgagor's estate. Supposing the mortgagor had made an agreement before his death to sell to the company for £11,950, of which £9150 was to be compensation for the value of the premises, and £2800 for loss of profits, and there had been no suit, the mortgagee could not have taken the whole sum of £11,950.

Dickinson, Q.C., and *J. T. Humphry*, for the executors.

Hastings, Q.C., and *Oswald*, for the Petitioners, were not called on.

JAMES, L.J.:—

Really there is no reason for this appeal. It seems to me that the decision of the Vice-Chancellor in this case is quite right. It appears quite a novel thing for a mortgagor to endeavour to take possession of part of the compensation payable for the mortgaged property. It is said that part of the compensation is in respect of the profits of trade. We may see exactly how those words came to be used, and what it was that was really meant by it. There was a trade carried on upon the property. The mortgagees had entered into possession of the property, and the railway company—either before or after they had entered into possession—gave notice to take the property for the purposes of the railway, and gave the usual notice to treat. Then the arbitrators are ap-

(1) 5 Russ. 29.

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pointed, and an umpire is appointed by the arbitrators, expressly to ascertain the compensation which is payable under the Act of Parliament by reason of the company exercising their powers. That is not for any other collateral damage which anybody else might have sustained, but it was the compensation for value of the land and for the damage. The mortgagees were the absolute owners in possession of everything. They were the only persons that could have made profits if anybody could make profits of it, and the arbitrators and the umpire had to ascertain what was the proper compensation to make. In ascertaining that they used the words "compensation for severance," and so on, and "for the profits of the business." One must suppose they intended to act under the authority which was given to them—in fact they had no other—by the submission to the arbitration, and they took the profits as one of the elements which entered into their calculation. What must be supposed to be meant was, that in estimating the value they estimated the diminished capacity of the property to make profits for the future. The £2800 was the estimate, that is to say, treating it not merely as a leasehold property, but as a leasehold property upon which a business was carried on, and they said, "We think that for that property and the business which could be carried on upon it, for the goodwill of that business and the profits made upon it, that sum ought to be given." It is very much the same case as *Chissum* v. *Dewes* (1), which has been referred to, which was the case of the sale of a public-house and the goodwill.

BAGGALLAY, J.A., and LUSH, J., concurred.

Solicitors: *J. W. Hickin ; G. Dixon*, agent for *Ranson & Nelson, Sunderland.*

(1) 5 Russ. 29.

In re REGENT'S CANAL IRONWORKS COMPANY.

C. A.
1876
V.-C. M.
Feb. 19.
C. A.
April 11.

Debentures—Issue at Discount—Security—Pari passu.

The directors of a company were empowered to issue 100 mortgage debentures at £95 for £100. Sixty of these debentures were duly taken up; the other forty were afterwards mortgaged by the directors by way of collateral security for an advance of money. The company was afterwards wound up:—

Held (affirming the decision of *Malins*, V.C.), that the mortgage was not *ultrà vires*, and that the mortgagees would receive dividends on the whole amount expressed to be secured by their debentures, *pari passu* with the holders of the other sixty debentures.

Statement.

THE *Regent's Canal Ironworks Company* was registered in 1864, with a capital of £250,000, and by the articles of association the directors were empowered from time to time to borrow any sums of money on mortgage or on bonds or debentures, at such rate of interest and upon such terms as the directors might think proper. At a meeting of the directors held on the 21st of March, 1865, resolutions were duly passed for issuing mortgage debentures for £25,000, in 100 debentures of £250 each, issued at £95 for £100. Sixty of these debentures were taken up by different persons, and the remaining forty debentures were issued to *J. D. Carnegie* and *W. H. Carington* as trustees for the company. On the 5th of August, 1865, the *International Financial Society* agreed to advance to the *Ironworks Company* £8000 by discounting promissory notes to that amount, bearing 10 per cent. interest, the *Ironworks Company* giving to the *Financial Society* forty mortgage debentures for £10000 as security. The *Financial Society* accordingly discounted the notes, and *Carnegie* and *Carington* transferred the forty debentures to two trustees for the *Financial Society*.

By an indenture, dated the 6th of December, 1865, and made between the companies, after reciting that the *Ironworks Company* had issued to the *Financial Society*, by way of collateral security for the money so advanced, debentures to the amount of £10,000, it was agreed that if the promissory notes were not paid the *Financial Society* should be at liberty to sell the debentures, and apply the proceeds of the sale towards the payment of what

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remained due to them. The deed also, by way of further security, charged the seventh call then about to be made.

Each debenture was in the form of a deed-poll, by which the *Ironworks Company* declared itself liable to pay to the person named therein the sum of £250 and interest at 6 per cent., and also charged all the lands, property, and effects which the company held or possessed, or should hold or possess, with the due payment of the principal sum and interest; and on each debenture it was stated to be part of an issue of 100 £250 debentures.

Statement.

The company was afterwards ordered to be wound up, and there was in Court a considerable sum of money, the proceeds of the sale of leaseholds and property. The *Financial Society*, to whom about £5600 was due for principal and interest, claimed to prove for the £10,000, and to share with the other debenture holders.

The matter came before the Chief Clerk in Chambers, and was adjourned into Court, and heard before Vice-Chancellor *Malins* on the 19th of February, 1876.

Argument.

J. Pearson, Q.C., and *Davey*, Q.C., for the *Financial Society*, cited *In re Anglo-Danubian Steam Navigation and Colliery Company* (1).

Glasse, Q.C., and *C. T. Simpson*, for the other debenture holders, besides using the arguments which were used on the appeal, cited as to the mortgage extending to future calls, *Bowen* v. *Brecon Railway Company* (2).

Judgment, V.-C. M.

Malins, V.C., after stating the facts of the case, continued:—

In order to determine this question, we must look to what was the intention of the parties in the original contract when the debentures were issued. It is perfectly clear that every holder of a debenture must, from the face of the debenture, know that he is a holder of a debenture, part of the issue for £25,000, and that they are all alike, there is no priority between them, and they are in every way put upon an equality.

It has been argued, and to that part of the argument I accede,

(1) Law Rep. 20 Eq. 339. (2) Law Rep. 3 Eq. 541.

that the contract was that they were only to stand upon an equality with those who took the debentures at £95. That, therefore, if any one came subsequently, and took the debentures, not at 6 per cent., but say at 10 per cent., or, instead of paying £95 for them, took them at £50 (which would be much the same thing), then, inasmuch as the contract was that they were to stand on an equality only with those who took the debentures at £95 per cent., and 6 per cent. interest, they ought not to stand on an equality with those who have taken at a lower price or at a greater rate of interest, and ought not to come in competition with them. And if the transaction which I have to deal with had been of that nature, it would have been exceedingly likely that the argument of Mr. *Glasse* and Mr. *Simpson* would on that ground have succeeded. But, assuming that to be the right of the parties, did the *International Financial Society* take these debentures for less than £95 per cent.? It appears that they paid £8000, and got £10,000 worth of debentures no doubt, but by way of security only. Now, if they took the debentures by way of security, what injury is done to those who were the original holders of the sixty debentures? Their condition is not worse by this transaction. The company required the money, and it was to the advantage of all parties that the money should be had for the purpose of carrying on the operations of the company. The *International Financial Society* do not claim to hold these debentures as for the full amount, unless the full amount is due to them. But it seems to me that the debentures were issued in pursuance of the powers given by the articles of association, and for the express purpose of being used when the necessities of the company required that they should be used; and, being given by way of collateral security for this debt, it appears to me that the *Financial Society* is entitled to hold them as a security.

That being the case, I cannot consider that the company paid less for them than what was due upon them; consequently the property must be distributed rateably amongst the holders of the debentures.

The proper form of order will be: The Court being of opinion that the *Financial Society* is entitled to prove for the amount due on the forty debentures transferred to them, with £6 per cent.

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interest thereon, *pari passu* with the holders of the remaining sixty, but is not to receive more in the whole than what is due to them for principal, interest, and costs, in respect of the £8000 advanced by them with 10 per cent. interest, Let the matter be referred to Chambers for an account to be taken accordingly.

C. A.

The other debenture holders appealed from this decision, and the appeal came on to be heard on the 11th of April, 1876.

Argument.

Glasse, Q.C., and *C. T. Simpson*, for the Appellants:—

These debentures were not properly issued. The directors had no right to issue them to trustees. Moreover, nothing was paid for them by the trustees, and the present holders, as transferees, cannot be in a better position than their transferors. They cannot hold, as against the other debenture holders who paid £95 per cent. debentures for £10,000 on which they paid only £8000. Nor had the directors any right to issue these debentures on any other terms than at 5 per cent. discount and 6 per cent. interest; but they issued them at an unknown discount, and 10 per cent. interest. The issue of these debentures for less than the other debenture holders paid was a breach of faith, and *ultrà vires* and void: *In re Blakely Ordnance Company* (1); *Pellatt's Case* (2). Our security is not on six-tenths of the assets, but on the whole. The debentures might perhaps have been issued at a discount, but could not be issued as collateral security. The property of the company might be made collateral security, but not these debentures.

J. Pearson, Q.C., and *Davey*, Q.C., for the *Financial Society*, were not called upon.

Judgment, C. A. James, L.J.

JAMES, L.J.:—

I think that the order of the Vice-Chancellor cannot be disturbed.

The position of the Appellants is this: They are the owners of six-tenths of an aggregate mortgage of £25,000. They became the owners of that six-tenths of the debenture debt with full notice

(1) Law Rep. 8 Eq. 244. (2) Law Rep. 2 Ch. 527.

that the company intended to deal with the other four-tenths as they might be advised. The company has accordingly dealt with the other four-tenths by making it a collateral security for the sum of £8000 and interest at 10 per cent. That was the bargain between the *Financial Society* and the company. The company could not recede from that bargain, and I cannot see that there is any equity on the part of the holders of the other six-tenths of the mortgage debt to alter the bargain between the debtors and the creditors.

Judgment, C. A. James, L.J.

That being so, it seems to me that the order must remain. The Respondents have got this four-tenths of the mortgage debt quite as much as the Appellants have got the six-tenths, and the mode in which that four-tenths is to be applied is governed by the instrument which was executed between the company and the creditors. I think the Vice-Chancellor was quite accurate in saying that it is their right to have it treated as a collateral security, and to have what is due on the four-tenths ascertained in exactly the same way as what is due on the six-tenths is ascertained, and of course to be applied, so far as may be wanted, in payment of what is due in respect of the £8000 and interest.

I do not see my way to altering the order of the Vice-Chancellor in any respect.

MELLISH, L.J. :—

Mellish, L.J.

I am of the same opinion.

It appears to me that the proper way of looking at this case is to inquire what was the bargain with respect to these debentures as between the *Ironworks Company* and the *Financial Society*, and then to inquire whether the other debenture holders have any equity to prevent that bargain from being carried into effect. Now, as between the company and the society, there is no doubt that the debentures were to be a collateral security for the money which was lent upon the promissory note and the interest. That was the bargain between them, and one of the terms of the bargain was that the *Financial Society* was to be entitled to sell the debentures. Mr. *Glasse* argues, in the first instance, that because the resolution of the directors was that they should be issued at £95 and at 6 per cent. interest, they could not be issued on any other terms.

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But that was nothing more than a resolution of the directors, and they were perfectly competent to vary that resolution, and to issue them in any other way.

Then the real question is, have the other debenture holders any equity to prevent that bargain from being carried out? The rights of the other debenture holders depend solely on their debentures, and they have nothing to do with the resolution of the directors as to the terms on which the debentures were to be issued. They can claim no greater rights than the debentures give them. The debenture says that the whole number is to be 100. The Appellants have got sixty, and they are all to have an equal security. They took theirs by giving no doubt £95, and getting £100 security for each £95 that they advanced. Those were the terms, and they left it open to the directors to issue the others on any other terms they might think advisable. I do not see any reason why they should complain of the terms upon which the directors did issue them, namely, as a collateral security for the payment of the notes and interest. They are not injured as the debentures cannot be paid twice over—they can only be paid once. The order treats them as a collateral security, and says that they are to be available until the holders are paid the whole amount for which they were intended to be a collateral security. That order appears to me to be quite correct.

Judgment, C. A. Mellish, L.J.

Baggallay, J.A.

BAGGALLAY, J.A.:—

I am of the same opinion. It appears to me that the directors had power to do that which they did, namely, to issue the debentures for £10,000 as a collateral security for the loan of £8000, which was primarily secured by the promissory notes. If the matter had rested here, it seems to me that there could have been no question as regards the propriety of the order made by the Vice-Chancellor, but in the course of the argument it has been suggested that, at a subsequent period, the *Financial Society*, not being satisfied with the security which they held, applied for a further security, and that they had, by way of further security, a charge upon the future calls to be made by the company, that is to say, a charge upon property which was not included in the property upon which the debt was charged. Any moneys received by

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virtue of that charge upon future calls would no doubt be properly applied in reduction of the debt itself, but cannot, as it appears to me, in any way be regarded as a reduction of the security which they held on the debentures.

JAMES, L.J. :—

The appeal will be dismissed with costs.

Solicitors: *C. Morgan; G. M. Clements.*

SMITH *v.* WEBSTER.

C. A. 1876 V.-C. M. *March* 20. C. A. *June* 1.

[1874 S. 127.]

Statute of Frauds (29 *Car.* 2, *c.* 3, *s.* 4)—*Memorandum of Agreement*—*Signature by Agent.*

W. entered into a verbal agreement with *A.* to sell him an inn called the *Lion Inn* for £950. On the following day *W.'s* solicitor wrote to *A.'s* solicitor:—"*W.* has been with us to-day, and stated that he had arranged with your client *A.* for the sale to the latter of the *Lion Inn* for £950. We therefore send herewith draft contract for your perusal and approval":—

Held (reversing the decision of *Malins*, V.C.), that this letter was not such a note or memorandum of an agreement as is required by the *Statute of Frauds*.

5 Ch D. 65
2 QBD 32
4 CPD 45

Statement.

ON the 3rd of December, 1873, the Plaintiff *William Allen*, on behalf of himself and the Plaintiff *R. W. Smith*, entered into a verbal agreement with the Defendant *W. Webster* for the sale by the Defendant to *Allen* and *Smith* of certain premises known as the *Golden Lion Inn*, at *Worksop*, and the fee simple in possession, for the sum of £950. The evidence of the Plaintiff *Allen* and the Defendant was in direct contradiction as to whether anything was said as to a formal contract being drawn up. The same parties also entered into an agreement at the same time for the purchase by the Plaintiffs from the Defendant of certain brewing utensils in an inn at *Retford* which belonged to the Defendant.

On the 4th of December, 1873, the Defendant called upon his solicitors, Messrs. *Marshall & Co.*, and informed them that he had

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entered into a verbal arrangement for the sale of the messuage and premises at *Worksop* for £950, and instructed them to prepare an agreement. Messrs. *Marshall & Co.* thereupon prepared the draft of a formal contract in writing for the sale of the premises, and forwarded it on the same day to Mr. *J. Whall*, of *Worksop*, who was the Plaintiff's solicitor, together with the following letter:—

"Dear Sir,—Mr. *W. Webster*, of the *Golden Lion, Worksop*, has been with us to-day, and stated that he had arranged with your client, Mr. *Allen*, for the sale to the latter of the *Golden Lion* for £950. We therefore send herewith draft contract for your perusal and approval."

The draft contract was shortly afterwards returned by Mr. *Whall* to Messrs. *Marshall & Co.*, with some alterations therein. Messrs. *Marshall & Co.* sent the contract so altered to the Defendant, and requested him to sign it. The Defendant, however, did not sign it, giving as his reason that the Plaintiffs had refused to carry into effect their agreement to purchase the brewing utensils at *Retford*. The Defendant alleged that the Plaintiffs had agreed to give £28 for them. The Plaintiffs asserted that the price was £15, and ultimately the Plaintiffs paid for them at a valuation of £16 10*s*. The Defendant alleged that the agreements for the sale of the utensils and of the *Golden Lion* were parts of one and the same agreement, and treating the refusal to pay £28 for the utensils as a breach of the agreement, he refused to carry it into effect as regarded the inn at *Worksop*. The Plaintiffs thereupon filed their bill for specific performance, and the Defendant by his answer claimed the benefit of the *Statute of Frauds*.

The case came on for hearing before Vice-Chancellor *Malins* on the 20th of March, 1876.

Argument.

Robinson, Q.C., and *Smart*, for the Plaintiffs:—

The verbal contract on the part of the Defendant to sell the *Golden Lion Inn* for £950 to the Plaintiff is admitted on both sides, and this, if in writing, would have been sufficient, without any more formal document: *Fowle* v. *Freeman* (1). The only

(1) 9 Ves. 351.

question is, whether the Plaintiff can get off his agreement on the ground that there was no valid contract in writing within the *Statute of Frauds*. The statute says that such a document must be signed by the party to be charged, or by his agent lawfully authorized thereunto. We submit that the Defendant's solicitors, the Messrs. *Marshall*, were agents with authority from the Defendant to prepare the contract and to communicate the terms thereof to the Plaintiff or his agent. This is like the case of *Owen* v. *Thomas* (1). We say that the communication made by the solicitor was a communication in writing by the vendor's agent thereunto lawfully authorized sufficient to satisfy the statute.

The allegation that the agreement to sell the house was part of an agreement to sell also the brewing utensils, and one was to depend upon the other, is a mere pretence. The brewing utensils were in a different town, and when the dispute arose as to the price, that was settled by arbitration, and the money paid and the utensils handed over.

Glasse, Q.C., and *Simmonds*, for the Defendant:—

There was no document signed by the Defendant. It was a mere verbal agreement. The Defendant authorized his solicitor to prepare a contract, but that very direction affords cogent reason that the Defendant never intended it should be binding upon him until executed. This was the case in *Ridgway* v. *Wharton* (2).

It is not within the scope of a solicitor's business to act as agent for the sale of property. These ~~Defendants~~ were never constituted agents of the Defendant; their only duty was to prepare a contract which was about to be entered into. There was to be no contract binding upon the Defendant, except that which, upon being reduced into form, should be signed by him. There could be nothing more dangerous than that a communication made by a man's solicitor, without authority to sign a contract, should have the same effect as a written agreement signed by the party himself.

Even when the draft of the contract was sent to the Plaintiff's solicitor it was not accepted, but alterations were made in it which the Defendant alleges to be material; how then can the docu-

(1) 3 My. & K. 353. (2) 3 D. M. & G. 677; 6 H. L. C. 238.

C. A. 1876 SMITH v. WEBSTER. Argument.

ment constitute a final contract in writing? *Earl of Glengal* v. *Barnard* (1).

Robinson, in reply :—

Where a solicitor has been instructed by a vendor to carry out a contract, and has accepted the alterations of the purchaser, and has had the contract engrossed for signature, that is a document in writing by the agent of the vendor which comes within the statute. The solicitor cannot say he was not the agent of the vendor to put his name to the terms of the agreement. He was avowedly the agent for sending the written agreement, and was therefore the agent for settling the terms of the contract already agreed upon between the parties.

Judgment, V.-C. M.

MALINS, V.C. :—

This is distinctly stated by the Defendant: "On the 3rd of December, 1873, I admit that the Plaintiff *W. Allen* and I came to a verbal agreement whereby the said *W. Allen* agreed to purchase from me, and I agreed to sell to the Plaintiffs, the said messuage and premises and the inheritance in fee simple, free from incumbrances, at or for the price of £950." And that is as distinctly asserted by the Plaintiffs. Now, if that verbal agreement had been simply reduced into writing, however informal it might have been, "I agree to sell the *Golden Lion* to you for £950, and I shall instruct my solicitor to prepare a formal contract," then the authorities, which do not even begin with *Fowle* v. *Freeman* (2), always referred to on such subjects, and which has been here referred to again, have laid it down that the circumstance of a more formal contract not being prepared does not prevent the original contract being binding.

This is the case of a contract most distinctly entered into, and the terms of which admit of no shadow of doubt whatever. But then comes the *Statute of Frauds*, which upon broad public principle has made it the law that you cannot charge a man with a contract relating to land unless there be a note or memorandum of it in writing, signed by the party to be charged, or some other

(1) 1 Keen, 769. (2) 9 Ves. 351.

person thereunto by him lawfully authorized. The decisions under that statute have been uniform, viz., that it is not necessary that there should be mutuality; it is quite sufficient that the party to be charged has himself signed, or has signed by some person duly authorized by him.

In *Owen* v. *Thomas* (1) the parties agreed, as in the present case, by a verbal contract only, and as soon as the agreement was come to, the Plaintiff by the direction of the Defendant wrote and sent to the Defendant's solicitor, Mr. *Church*, the following letter, which was signed by the Defendant:—

"Mr. *Samuel Church.*

"Dear Sir,—I have this day sold the house, &c., in *Newport* to Mr. *John Owen* for 1000 guineas, and I am to receive the next half-year's rent, the money to be paid as soon as the deeds can be had from Mr. *Deere*, and you will be pleased to lose no time in getting them from him."

In that case, inasmuch as the contract was signed by Mr. *Thomas*, there was no difficulty in that respect, he being the vendor; but the principal difficulty arose in this way: it has always been considered necessary to ascertain what was the subject-matter of the contract. All that was there described was "the house at *Newport*," and Sir *John Leach* decided that, as "house" was indefinite, therefore on that subject parol evidence was, as is always the case, admissible to shew what the contract was. This case presents no difficulty of that kind, as the subject-matter of the contract is admitted on both sides to be the *Golden Lion* at *Worksop*.

Now, the statute says there must be a memorandum in writing of the terms of the contract, signed by the party sought to be charged, or by his agent thereunto lawfully authorized. The only memorandum here signed is the memorandum by Messrs. *Marshall & Co.* to Mr. *Whall*, of *Worksop*, the Plaintiff's solicitor:—

"Dear Sir,—Mr. *Webster*, of the *Golden Lion, Worksop*, has been with us to-day, and stated that he had arranged with your client, Mr. *Allen*, for the sale to the latter of the *Golden Lion* for £950; we therefore send herewith draft contract for your perusal and approval."

(1) 3 My. & K. 353.

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Now, when the parties separated on the 3rd, although no doubt there was as clear a contract between them as ever there was in the world, still it was not such a contract as could have been enforced, because it was, so far, merely by word of mouth. Mr. *Webster* then goes to his solicitor, and gives him instructions to prepare a formal contract.

Arguments have been addressed to me to shew that the solicitor had no authority to sell his client's property, but I think that requires and admits of no argument. He gives him directions to do all things necessary to carry the contract into effect. Then what was the extent of the authority given to Messrs. *Marshall & Co.*? It is admitted in effect that the Defendant goes to them and says, "I have sold the *Golden Lion Inn* at *Worksop* to Mr. *Allen* for £950. Do all things that are necessary to carry that contract into effect." Clearly that is an authority to prepare a contract. It is perfectly clear that the preparing of that contract was not in any way to be binding on the Defendant until that contract was signed. If nothing more had taken place, there it would have stopped, and nothing could have been enforced, for then there would have been no communication with the Plaintiff. The question, to my mind, is, what was the extent of the authority? Was it an authority by the vendor to prepare a contract to sell the inn for £950, and an authority to his solicitors to communicate to the solicitors on the other side the terms of the contract? If it was an implied authority to do all things that were necessary, then it was an authority to communicate not only the terms and the price, because the Plaintiff did not want to have communicated to him what was the price he had agreed to give for the inn, but it seems to me it was an authority to do all things necessary to carry the contract into effect; and among other things it was necessary that they should write to the agent of the Plaintiff. Of course the agent of the Plaintiff would be his solicitor. Then, were the Defendant's solicitors at liberty to tell the Plaintiff's agent what the terms of the contract were? It seems to me they were the agents of the Defendant not only for the purpose of carrying the contract into effect, but that that involves an authority to tell the agent of the Plaintiff what those terms were. Therefore, although I am quite clear there could be no implied authority on Messrs.

Marshall's part to enter into a contract, there was an authority to Messrs. *Marshall* to effect a contract already deliberately entered into between the vendor and purchaser, upon certain terms, and that authority included an authority to communicate what those terms were. If they had that authority, the *Statute of Frauds* is complied with, because there must be a contract. It need not be a formal contract in writing, but there must be a note or memorandum of it of some kind signed by the party to be charged therewith, or by his agent lawfully authorized.

Now, I think this is a case in which the Court would desire to carry into effect such a contract if possible, looking at what the contention has been before me. The only contention I have heard was this. There was one contract for the purchase of some brewing utensils, not in the *Golden Lion*, but somewhere in the neighbouring town of *East Retford*. The Defendant says he was to have £28 for these brewing materials. The Plaintiff seems to have misunderstood it in some way, and therefore went to a third person, who fixed the value at £16 15*s*. That sum was paid, and the Defendant therefore, having had the value of his brewing utensils, ought, I think, to have been satisfied. But, because he did not get the whole sum of £28 that he claimed, then he says, "Although I have deliberately sold you the *Golden Lion* for £950, and although I have so unequivocally exhibited my intention of so doing that I have instructed my solicitors to prepare a contract, and it has been prepared, I am not bound by the *Statute of Frauds*, and therefore I set the contract entirely at defiance." That is a contract which every Court would endeavour to find the means of enforcing, if possible, against a vendor who had so entered into it. But I have come to the conclusion on the whole of the case that the authority the vendor gave to his solicitors to carry the contract into effect was an authority to communicate the terms to the other side, and therefore by that delegation of authority it becomes the statement of his agent thereunto lawfully authorized, in which statement the terms were correctly set forth, as he says by his answer.

This is a decision on a somewhat new point, which may not be free from doubt; but I think, on the whole, the anxiety which is always shewn by the Court to bind men to their own deliberate acts justifies me in holding this gentleman to his con-

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tract, for the carrying into effect of which he gave authority to his agent.

The decree, therefore, will be for the specific performance of the contract.

There will be the usual reference as to title, and the Plaintiff must have the costs.

C. A.

The Defendant appealed from this decision, and the appeal came on to be heard on the 1st of June, 1876.

Argument.

Glasse, Q.C., and *Simmonds*, for the Appellant:—

The letter of *Marshall & Co.*, if it is a memorandum of any contract, is a memorandum of an open contract, without any limitation of the right of the purchaser to require a marketable title and call on the vendor to furnish at his own expense all the evidence in support of it. Into such a contract the vendor never intended to enter. The solicitors had no authority to sign any document which should bind the Defendant. Their letter was written with an entirely different view.

Robinson, Q.C., and *Smart*, for the Plaintiff:—

The reference to a more formal contract does not prevent an informal memorandum from being binding.

[JAMES, L.J.:—It is much to be wished that some of the cases on that head could come before an authority competent to overrule them. On several occasions parties have found themselves entrapped into a binding contract when they never considered themselves to have entered into any agreement, but thought they were only settling one term of the contract—the price.]

The solicitors received authority to do what was necessary to carry the agreement into effect, and that includes an authority to signify in writing its terms to the other party.

[*Jackson* v. *Lowe* (1) and *Jackson* v. *Oglander* (2) were referred to.]

Judgment, C. A. James, L.J.

JAMES, L.J.:—

I am of opinion that this cannot be considered such a memoran-

(1) 1 Bing. 9. (2) 2 H. & M. 465.

dum in writing as is required by the *Statute of Frauds.* The statute requires that the agreement, or a "memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized;" that is to say, lawfully authorized to sign a contract, or to sign a memorandum or note of the contract.

Judgment, C. A. James, L.J.

In this case there is no such contract signed by the Defendant himself. He goes to his solicitor, and the only authority he gives his solicitor is to prepare a formal document; he gives him no authority to do anything more. Supposing the letter had run thus:—"Mr. *Webster* has been with us to-day, and has told us that he has sold the property to you for £950." It is quite clear that that, even assuming the solicitors to have authority to sign a binding memorandum, would not have been a memorandum or note of an agreement within the meaning of the *Statute of Frauds;* it would have been a mere communication of a fact, and the signature would not make it a binding memorandum, not being affixed *eo intuitu.* All that the solicitors say is, that they are informed by the Defendant that a verbal arrangement has been entered into for the sale of the property at a certain price, and that they therefore send a draft of the contract, which is a different contract, and is not the contract sought to be enforced. It is a contract which was never assented to by the parties, and they were never at one upon it. That being so, it appears to me impossible to make out a contract from a solicitor merely giving a reason why he was sending a document to the other man's solicitor. I do not think that can be, within the meaning of the *Statute of Frauds,* a memorandum signed by a man authorized to sign it as binding the person interested.

I am of opinion, therefore, that the Vice-Chancellor's doubts were well founded, and that this is not a memorandum within the meaning of the *Statute of Frauds.*

BAGGALLAY, J.A.:—

Baggallay, J.A.

From the evidence in this case other than that furnished by the letter of the 4th of December, 1873, it appears to me that the arrangement or agreement come to by Mr. *Webster* on the 3rd of December was to sell the *Golden Lion* for £950, but that that

C. A. 1876 SMITH v. WEBSTER. Judgment, C. A. Baggallay, J.A.

arrangement or agreement was conditional upon a formal contract being signed. It appears to me also clear that the authority which was conferred upon the solicitor by Mr. *Webster* was not to convert that conditional agreement into an absolute agreement, but to prepare, and to procure to be executed, a proper contract which would express the terms of the agreement. That being the case, if the letter of the 4th of December, 1873, could be construed as in fact expressing an agreement absolutely to sell the property for £950, I should be of opinion that the solicitors had no authority to write such a letter, and that they were not persons lawfully authorized by their principal to sign it. But when I look at the letter it appears to me to be clear what was the intention of the parties. The reference to the arrangement for the sale of the *GoldenLion* for £950 is merely in the nature of a recital shewing why Messrs. *Marshall* addressed to him that letter. It says: "We therefore send herewith draft contract for your perusal and approval." The very addition of those words, "perusal and approval," appears to me to indicate that they were not thereby confirming or entering into an agreement, but that they were merely forwarding that draft contract for approval.

Therefore I think the decision of the Vice-Chancellor must be reversed.

Lush, J.

LUSH, J.:—

I am of the same opinion. In order to satisfy the statute a note or memorandum must be one which the principal has authorized the agent to sign as a record of the transaction. Now the authority to the solicitors here was not to write a letter which should contain the terms of the contract, but merely to prepare a formal draft contract to be sent to the other side for perusal and approval, and when perused and approved to be signed by the parties themselves. That is all the authority which the solicitors had. The statement as to the substance of the contract was merely introductory to the business which they were commissioned to transact. The letter was never intended by them to be a contract, nor to be anything binding.

Solicitors: *R. Smith; W. H. Tattam.*

In re THARP.

C. A.
1876
July 15.

Settled Estate—Lunatic Protector of Settlement—Consent of Court to barring Entail—Interest of Lunatic.

A lunatic was tenant for life of the advowson of a rectory and other real estate. Under the order of the Court a lease of the property for ninety-nine years, if the lunatic should so long live, had been made to two persons at a large rent. This lease had become vested in the administrator of the survivor of the two lessees, the administrator being also the first tenant in tail in remainder expectant on the death of the lunatic without issue male. The lunatic was aged eighty-two, and had never had any issue. The administrator wished to sell the next presentation to the rectory, and petitioned the Court, as protector of the settlement, to consent to the barring of the entail of the advowson so far as might be necessary for effecting the proposed sale:—

Held, that, as the application was not for the benefit of the lunatic's estate, but only for the benefit of a collateral, the Court ought not to interfere.

Statement.

JOHN THARP was found a lunatic by inquisition on the 17th of January, 1816. He was tenant for life of certain settled real estates, including the advowsons of the rectory of *Snailwell* and the vicarage of *Chippenham*, in the county of *Cambridge*. Under the provisions of the settlement, *W. M. Tharp*, the Petitioner, was the first tenant in tail in remainder expectant on the death of the lunatic without issue male. The lunatic was of the age of eighty-two. He had been married, but his wife was dead, and there had never been any issue of the marriage.

On the 27th of December, 1864 (in pursuance of an order made in Lunacy and Chancery on the 1st of July, 1864), the lunatic, by his committee, executed a lease of part of the settled estates (including the advowsons) to *J. S. Tharp* and *J. M. Gordon Tharp*, from the 25th of March, 1864, for ninety-nine years, if the lunatic should so long live, at a rent of £2500, and subject to certain covenants. Both the lessees were dead. *J. M. Gordon Tharp* was the survivor, and administration to his estate was granted to the Petitioner.

The Petitioner desired to have the next presentations to the rectory and vicarage sold, and for that purpose to bar, so far as might be necessary, his estate tail and the remainders over; and

C. A. 1876 ~~ *In re* THARP.

the petition asked for the concurrence of the Court in the place of the lunatic as protector of the settlement.

Statement.

The present incumbent of both livings was the Rev. *A. J. Tharp*, who was aged seventy-one, and in weak health. He was also the next tenant in tail in remainder expectant on the death of the Petitioner without issue male. The Petitioner had been married for some years, but had had no issue. The petition stated that it would be greatly to the advantage of the persons interested in the patronage of the benefices that the next presentations thereto respectively should be sold, inasmuch as if the benefices should become vacant, the value of the presentations would be lost to the estate. Moreover, the Petitioner, in his character of administrator to the estate of *J. M. Gordon Tharp*, required any pecuniary interest which he might be entitled to in the proceeds of sale for the purpose of paying debts of the intestate.

Argument.

J. Pearson, Q.C, and *W. B. Heath*, for the Petitioner :—

The Petitioner being in possession under the lease, this is a reasonable application.

Langworthy, for the Rev. *A. J. Tharp* :—

The application is not made for the benefit of the lunatic's estate. It can only benefit one collateral at the expense of another, and my client is a nearer relation to the lunatic than the Petitioner is.

Judgment, James, L.J.

JAMES, L.J. :—

I do not think that we ought to interfere. There is nothing affecting the interests of the lunatic himself or his estate. The term was only created for the purpose of putting the family in possession of the family estates. I think that the advowson ought to be left to go with the estates.

Mellish, L.J.

MELLISH, L.J. :—

As a general rule, the owner of an estate does not wish to separate a family living from the estate. The Petitioner is now in a position to sell the next presentation, subject to the risk of his dying before the lunatic.

Solicitors : *Western & Sons ; Ford & Lloyd.*

In re REYNOLDS.

C. A.
1876
July 15.

Fund in Court—Money to be laid out in Land in Settlement—Payment out to Tenant in Tail—Disentailing Deed.

A fund in Court in a lunacy, the lunatic being dead, represented land in settlement. A deceased tenant in tail had created a base fee:—

Held, that the fund could not be paid out to the persons claiming through him, except upon the production of a deed enlarging the base fee.

In re Butler's Will (1) followed.

Statement.

THIS was a petition in the lunacy of *C. C. Reynolds*, who died in 1858.

In pursuance of an order made by the Lords Justices on the 25th of June, 1860, a sum of £443 6*s.* 4*d.* consols was carried over to an account intituled "Share of *George Reynolds*, deceased; the account of the real estates." This fund had arisen from the sale, under the provisions of a private Act of Parliament, of real estates of which the lunatic was tenant in tail. *George Reynolds* was a brother of the lunatic, and was entitled as tenant in tail in remainder, expectant on the death of the lunatic without issue, to a share of the estates. The lunatic died without issue. *George Reynolds* left surviving him a widow, and two daughters his only children. He had converted his estate tail into a base fee. The widow and daughters (the daughters having recently attained twenty-one) presented this petition, asking that the consols might be sold, and the money arising from the sale (after payment of costs) be paid to them.

Argument.

E. W. Byrne, for the Petitioner:—

Till recently it was the practice of the Court of Chancery to pay out money representing land in settlement to the persons who were capable of disentailing it, without requiring the execution of a disentailing deed. The Lords Justices did this in *Re Watson* (2). But in *In re Butler's Will* Lord *Selborne* required a disentailing deed, and a similar course was adopted by the Master of the Rolls in *In re Broadwood's Settled Estates* (3); Vice-Chancellor

(1) Law Rep. 16 Eq. 479. (2) 10 Jur. (N.S.) 1011.
(3) 1 Ch. D. 438.

C. A. 1876 *In re* REYNOLDS. Judgment.

Malins, however, in *In re Wood's Settled Estates* (1), followed the old practice.

JAMES, L.J.:—

We must follow the decision of Lord *Selborne*, which was in truth a decision of the Lord Chancellor, though he was then exercising an original jurisdiction in a matter attached to the Rolls Court. The fund can only be paid to the Petitioners upon the production to the Registrar of a proper deed enlarging the base fee.

MELLISH, L.J., concurred.

Solicitor: *E. Byrne.*

C. A. 1876 V.-C. M. *June* 24. C. A. *July* 19.

REPUBLIC OF COSTA RICA *v.* ERLANGER.

[1874 C. 113.]

Security for Costs—Old Suit—Rules of Court, February, 1876, *Order* LV.

Order LV. of Rules of Court, February, 1876, applies to suits commenced before November, 1875.

In a suit by a foreign government £120 security for costs had been given before the Judicature Acts came into operation. A large amount of costs would be incurred before the suit was heard, and further security to the amount of £500 to cover future costs was, under Order LV. of the Rules of Court, February, 1876, ordered to be given.

Order of *Malins*, V.C., reversed.

Statement.

THE bill in this case was filed in 1874, and in May, 1874, an order was made that the Plaintiffs, a foreign government, should give security for costs. The Plaintiffs accordingly paid £120 into Court as security.

The Defendants put in their answer, and the Plaintiffs had obtained leave to amend. Two of the Defendants, Messrs. *Knowles & Foster*, then obtained a summons for further security, and their solicitors made an affidavit that £1000 costs had already been

(1) Law Rep. 20 Eq. 372.

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incurred, and that a further sum of £1000 would probably be incurred before the cause was heard.

The summons was adjourned into Court, and came on for hearing before Vice-Chancellor *Malins* on the 24th of June, 1876.

J. Pearson, Q.C., and *Romer*, for Messrs. *Knowles & Foster*:—

Argument.

We ask that the Plaintiffs may be ordered to give such additional security for costs as the Court may think sufficient. The power to do this is given by Order LV. of the Rules of Court, February, 1876. The Courts of Common Law have always had the power of directing substantial security to be given where the Plaintiff was a foreigner: *Lush's* Practice (1); *Emperor of Brazil* v. *Robinson* (2); *King of Greece* v. *Wright* (3); and now the power is intended to be general. The Judicature Acts and the Rules apply to all cases which are not expressly excluded: *Budding* v. *Murdoch* (4).

Glasse, Q.C., *Higgins*, Q.C., and *Locock Webb*, Q.C., for the Plaintiffs:—

The Court has no jurisdiction to make the order now asked for. The Plaintiffs, before the *Judicature Act*, had a right to institute a suit upon giving security to the amount of only £100, and the Legislature never could have intended to abrogate those rights. The delay caused would be considerable, as it would be necessary to communicate with the Government of *Costa Rica* in the first place, and all proceedings would have to be stayed in the meantime. The cases cited from the Common Law Courts do not apply to suits in Chancery, and in *Budding* v. *Murdoch* the application was for leave to amend, which has been given in many cases. The Plaintiffs cannot now be deprived of their right to carry on the cause as they might have done before the new Act.

J. Pearson, in reply.

MALINS, V.C.:—

Judgment, V.-C. M.

This application is one of great importance as affecting the proceedings of this Court in a suit instituted after the *Judicature Act* of 1873 passed, but before it came into operation.

(1) 3rd Ed. p. 929.
(2) 5 Dowl. 522.
(3) 6 Dowl. 12.
(4) 1 Ch. D. 42.

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The suit of the Republic of *Costa Rica* against Baron *Erlanger*, in which Messrs. *Knowles & Foster*, who make this application, are Defendants, is in substance this: The Republic charge—that whereas Baron *Erlanger* and Messrs. *Knowles & Foster* were their agents to raise a large sum of money in the English market by way of loan, Baron *Erlanger* or Messrs. *Knowles & Foster*, and the other Defendants, or some of them, amongst them have so contrived matters, that although a great sum of money has been raised in the English market on the faith of the *Costa Rica* bonds, a very insignificant part of the amount so raised has reached the Republic. That is the nature of the suit. It was instituted in the year 1874, and at that time, by the rules of the Court, it is perfectly clear that every foreign government, whether a foreign sovereign or a foreign republic, was bound, by the rules of this Court, to give security for costs, if required. Accordingly, the bill having been filed in 1874, and this being a foreign government, security for costs was required; and, according to the then practice of the Court, security was given for the amount which the practice, and the only practice existing on the subject, required, namely, by depositing £120. Everybody must admit that in an enormously heavy suit like this, such a security for costs is merely delusive, because it was a security for £120 to all the Defendants, who, if the bill is dismissed with costs, take that £120 amongst them; but the application being made, it was a matter of course; no expense was involved, and security was given.

Then, the Republic having, in 1874, given that amount of security for costs which the practice of the Court required, put themselves in a position to go on with their cause; and, accordingly, they have proceeded to prosecute it at a very heavy expense; and no doubt very heavy expenses have also been incurred by Messrs. *Knowles & Foster*, and by the other Defendants. I have no right to form any opinion on the merits of the case at the present time; I must treat it as a cause which may succeed, or one which may entirely fail. If it entirely fails, it will have to be dismissed with costs; and if dismissed with costs, certainly it will be a misfortune to those Defendants against whom it is so dismissed, that, in addition to having the inconvenience and mortification of unfounded charges of fraud made against them, and persisted in

for a long time, they may not be able to recover their costs from this foreign government.

The rule at common law was different from the rule of the Court of Chancery. In the Courts of Common Law it was substantial security, according to the nature of the case, and given from time to time; while in the Court of Chancery it was an arbitrary rule, which under no circumstances was departed from. In the *Winding-up Act* there is a provision that if an insolvent company in process of winding up becomes a Plaintiff, then the Court has a discretion as to the security for costs; and, accordingly, that point came before me in a case where an insolvent company, that is, a company ordered to be wound up, had filed a bill of great magnitude against three Defendants (1). They applied to me that the Plaintiffs, the company, should give security for costs. I there found myself armed with full power. I was not restrained by the old rule of the Court of Chancery, of £120, but I had a discretion as to the amount, and I thought that discretion also was as to the period at which the security should be given. The case made against the Defendants there was a very serious one, and if it turned out, upon their answer, to be correct, I thought it was one in which they ought not to have any security for costs at all. If it turned out incorrect, I said, when the answer comes in I shall be able to form a better opinion on the subject, and therefore I required the Plaintiffs to give such an amount of security for costs as would cover the expense of putting in an answer, giving them liberty to apply again if necessary.

The Legislature having armed the Judges with great power of making rules, this 7th rule of February, 1876, is made in these terms: "In any cause or matter in which security for costs is required, the security shall be of such amount, and be given at such time or times, and in such manner and form, as the Court or a Judge shall direct." I have no doubt whatever that, in any case instituted after these rules came into operation, the Court may exercise its discretion as to the amount of the costs, and may even go to the extent here required, of £2000, or £5000 if necessary; and may require, as security for costs, £100 at the beginning, and enlarge it from time to time, so as to secure the

(1) *Western of Canada Oil, &c., Co.* v. *Walker*, Law Rep. 10 Ch. 628.

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Defendant against loss if the bill ultimately comes to be dismissed with costs. If, therefore, the present suit had been instituted after the Act came into force, I should have no doubt whatever of my power to fix such an amount as would cover the proceedings up to the present time and any proceeding that may be taken within a reasonable time; and I could also give the Plaintiff time to provide that security. If I felt myself bound in this case to require additional security for costs, I certainly should give the Plaintiffs a reasonable time to provide that security, say six months; and I should not stay the proceedings in the cause in the meantime, but should stay them from the expiration of that period if the security were not given.

I think this rule is one that requires a very cautious application. This Court has in fact said to a foreign government: "Provided you do a certain thing, you may institute proceedings here, and if you comply with our rules you may go on with your cause." This Republic did comply with the rules; they deposited £120, whereupon the Court of Chancery said, You may go on with your cause; you are now *rectus in curia*. It would certainly be a very serious thing if a foreign government going on with a cause under these circumstances should be suddenly stopped because the law has been altered and new rules introduced, which may apply to an existing cause and which may not. I do not intend to decide that, but the inclination of my opinion is strongly that this rule ought to apply only to causes instituted after the *Judicature Act* came into operation. It is a very beneficial rule, and one which I shall cheerfully apply in a proper case. But considering that this Republic had taken these proceedings before the *Judicature Act* came into operation, they ought, I think, to be allowed to go on by the rules which existed when the suit was commenced. Upon the words of the rule there have been two views. The Plaintiffs say this is not a case in which security for costs is required, because security for costs has already been given. I think there is a great deal of force in that argument, and that may be the proper construction of the words. The Defendants, on the other hand, say that it applies to every cause in which security for costs is required by the rules of the Court, that is, in which, according to the rules of the Court, security for costs must

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be given. It is open to either interpretation; but, looking at the nature of this case, and the claim made against Baron *Erlanger* or Messrs. *Knowles & Foster*, and it being a discretionary power, it appears to me, in the exercise of that discretion, I should certainly come to the conclusion not to require additional security in this particular case.

I am very much inclined to think, also, that I ought to exercise the discretion by refusing the application in every cause instituted before the *Judicature Act* came into operation, and in which security has been given. If a suit, for instance, were commenced on the 31st of October last, and a Defendant, not served with notice till after the 2nd of November, when the *Judicature Act* came into operation, applies for security for costs, I think the rule of the Court at the time of the application made for security for costs ought to be applied, and I should not limit it to the £100. But where the suit has been previously instituted, where an application for security for costs has been made and complied with, it seems to me that case is taken out of the provision of this section, and that the Court ought to be very tender in applying subsequent rules to suitors who are regularly in the Court at the time when the Act passed. Moreover, I add to that, that in the exercise of my discretion, under the particular and extraordinary circumstances of this case, I should be very reluctant indeed to apply any rule which should have the effect in any way of stopping this litigation. If it be unsuccessful, that is, if the bill should be dismissed with costs against *Knowles & Foster*, I cannot help thinking they will not go without their costs if they prove themselves to be entitled to them.

On the whole, therefore, I come to the conclusion that I cannot accede to the application; the cause must go on, as far as my judgment is concerned, on the security already given.

The application must be refused with costs.

C. A.

The Defendants appealed, and the appeal came on to be heard on the 19th of July, 1876.

Argument.

J. Pearson, Q.C., and *Romer*, for the Appellants:—

The object of Order LV. of the Rules of Court, February, 1876,

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Argument.

is that, instead of the illusory security formerly given, real security should be given; and if ever there was a case for such security, it is that of a foreign government which does not pay the interest on its debt.

Glasse, Q.C., *Higgins*, Q.C., and *Locock Webb*, Q.C., for the Plaintiffs:—

The Defendants are the agents for the Plaintiffs, and the case against them is that they have the Plaintiffs' money, and prevent the Plaintiffs from paying. The suit was begun under the old practice, and the Plaintiffs had a right to suppose that they might go on under that practice. The Court has said to them that if they gave security they might go on, and they have done so. At all events, no security can be given for the costs already incurred.

Judgment, C. A. James, L.J.

JAMES, L.J.:—

I am of opinion that the Order was really meant to meet such a case as this. Under the old practice no doubt the rule of the Court of Chancery was that if the Plaintiff was abroad, whether he was a sovereign, a sovereign state, or an individual, he should give security for costs. The amount of that security was fixed at £100, probably because at that time that sum might be supposed to represent the costs which would be incurred, and if that sum were deposited it would be sufficient security. But times have changed, and £100 represents something very different now to what it did then, and the character of Chancery suits has changed since that time. Chancery suits like this, the pleadings in which fill a large folio volume, perhaps did not then exist. The value of money having changed, and times having changed, it was thought fit to introduce a change. The change was that, in any case or cause or matter in which security for costs is required, the security shall be of such amount, and be given at such time and in such manner and form as the Court or Judge shall direct. It is impossible for a Plaintiff, having given security for costs to the amount of £100, to say: "I have a vested right to go on and incur any expense, and to amend my bill, and make a new case entirely. My £100 gives me a vested right to go on and

laugh at any order which the Court of Chancery might make for payment of costs if I should fail." That being so, I think that the Court has power to order other security if required. It seems to me that the Defendants are entitled to have a reasonable amount. For the £1000 already incurred, no security can be given within the meaning of this order. I think that if security is given for £500, or that amount is deposited in Court, that is quite sufficient for the present. But this must not delay the amendment of the bill, and the Defendants are not to be under any obligation to answer or to incur any further expense until the security is given. The costs of the application and of the appeal will be costs in the cause.

Judgment, C. A. James, L.J.

MELLISH, L.J. :—

Mellish, L.J.

I am of the same opinion. No suitor has any vested interest in the course of procedure, nor any right to complain, if during the litigation the procedure is changed, provided, of course, that no injustice is done. Certainly there is nothing unjust in the rule which always has prevailed, that suitors who live abroad and have no property in this country should give security for costs. That was the rule in Courts of Equity and Common Law. There seems to have been a practice in Equity of limiting the amount, but that practice has been altered during this litigation. The order is that when there is a case in which security for costs should be given, the Court is to order it to be given for such an amount and at such time or times as may be just—thus making a technical security a real security; and I see no reason why the rule should not apply to this case. The Plaintiffs are a foreign republic having no property in this country, and if the Defendants succeed they will probably not get their costs unless they have security.

BAGGALLAY, J.A. :—

Baggallay, J.A.

I am also of the same opinion. It appears to me that the only question was, whether the rule applied to a cause commenced before the Judicature Acts came into operation. I think it is quite clear that the 22nd section of the *Judicature Act*, 1873, provides for the transfer of all pending proceedings to the High Court of

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Judicature, and the 23rd section provides that the jurisdiction shall be exercised, so far as regards procedure and practice, in the manner provided by the Act, or by such rules and orders of Court as may be made pursuant to the Act. Unless there is something in this cause to exempt it from the operation of any rule, the rule applies. Then, directly the rule is found to apply, it is clearly a case in which security for costs should be given.

Solicitors for Plaintiffs: *A. C. Edwards & Co.*
Solicitor for Defendants: *G. M. Clements.*

C. A. 1876 — July 13, 20.

In re WRIGHT. *Ex parte* ARNOLD.

Relation back of Title of Trustee in Bankruptcy — Protected Transaction — Dealing in Good Faith and for Valuable Consideration without Notice of Act of Bankruptcy—Notice of Intention to commit Act of Bankruptcy—Order and Disposition of Bankrupt—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 15 (*sub-s.* 5), 94 (*sub-s.* 3)—12 & 13 *Vict. c.* 106, *s.* 133.

4 C.L.D. 500 — 558
5 C.D. 29
10 C.L.D. 412
17 C.D. 64

The meaning of sect. 94 (sub-sect. 3) of the *Bankruptcy Act*, 1869, is in effect the same as that of sect. 133 of the *Bankruptcy Act*, 1849.

A creditor who receives notice of his debtor's intention to commit an act of bankruptcy is not bound to inquire whether the act has been committed, but is entitled to avail himself of his remedies just as if he had received no such notice.

The holder of a bill of sale, given to secure a debt, received notice on the 10th of March from the debtor's solicitor that the debtor was about to file a liquidation petition. The creditor at once sent a man to demand payment of the debt, and to take possession of the property comprised in the bill of sale if payment was not made. Possession was obtained on the 11th of March. The petition had been filed on the 10th of March, but neither the creditor nor the man who was sent to take possession knew this until after possession had been obtained:—

Held, that the taking possession of the property was a dealing with the debtor for valuable consideration which was protected by sect. 94, sub-sect. 3, of the *Bankruptcy Act*, 1869; that it took the goods out of the order and disposition of the bankrupt notwithstanding the prior act of bankruptcy; and that the creditor was entitled to retain the property as against the trustee under the liquidation.

Decision of *Bacon*, C. J., reversed.

Statement.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

On the 16th of February, 1876, *Edward Wright*, a builder of *Burgess Hill*, near *Brighton*, executed a bill of sale of his building plant and stock-in-trade to *G. E. Arnold*, a timber merchant at *Woolwich*, to secure a sum of £270 already due from him to *Arnold*. The bill of sale contained an absolute assignment of the property (which was specified in a schedule) to *Arnold*, with a proviso that, if *Wright* should pay the £270, with interest, to *Arnold* on demand, the deed should cease and be void. There was a covenant by *Wright* with *Arnold* to pay the £270, with interest, on demand, and that, in case default should be made in payment, it should be lawful for *Arnold* to take possession of the property and to sell it, and to retain the costs of sale and the debt and interest out of the proceeds of sale. The bill of sale was registered on the 3rd of March, 1876. On the 9th of March, 1876, *Wright's* solicitor wrote a letter to *Arnold* as follows:—

"Mr. *Edward Wright*, of *Burgess Hill*, having, from want of capital and other causes, been compelled to dismiss all his workmen and stop his works, and having therefore no prospect of being able to pay his creditors their demands in full, has requested me to file a petition for him under the liquidation clauses of the *Bankruptcy Act*. This will be done as soon as possible, but meanwhile he wishes me to give you notice of his intention."

This letter was received by *Arnold* on the morning of the 10th of March. He thereupon consulted his solicitor, and in the latter part of the day he sent a Mr. *Fisher*, who was his manager, down to *Burgess Hill*, to demand payment from *Wright* of the sum secured by the bill of sale, and to take possession of the mortgaged property if the payment was not made. *Fisher* could not find *Wright* that evening, but he saw him about 8.45 A.M. the next day, the 11th of March, and demanded payment. *Wright* being unable to pay, *Fisher* said he must take possession of the property, and he put a man in possession between 11 and 12 o'clock the same day. *Fisher* did not know of the filing of the liquidation petition till after this had been done. He afterwards removed the property and it was sold, and the proceeds of sale were retained by *Arnold* in part satisfaction of his debt.

Wright's liquidation petition was prepared and signed on the

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9th of March, and was filed in the *Brighton* County Court on the 10th of March. The statutory notices were sent out to the creditors by post on the evening of the 10th of March, and, so far as could be ascertained from the evidence, the notice sent to *Arnold* was delivered at his place of business at *Woolwich* on the morning of the 11th of March about 10 o'clock. *Arnold*, however, deposed that, being unwell that day, he did not go to his office till late, and that he did not read the notice on that day, and did not in fact know of the filing of the petition until Monday the 13th of March.

The trustee appointed under the liquidation petition applied to the County Court for an order that *Arnold* should refund the proceeds of the sale. The Judge dismissed the application, and the trustee appealed to the Chief Judge. The appeal was heard on the 22nd of May, 1876.

Argument.

Miller, Q.C., and *Francis Turner*, for the trustee :—

The execution of the bill of sale was an act of bankruptcy; it was an assignment of substantially all the debtor's property to secure a previously existing debt: *Ex parte Foxley* (1).

[BACON, C.J.:—It is not in terms an assignment of the whole property.]

At any rate, the petition was filed, and *Arnold* had notice of it before he took possession of the property. Upon the evidence the notice must have been delivered at *Arnold's* office by 10 o'clock on the morning of the 11th of March, and possession was not taken till between 11 and 12. Rules 14 and 256 of the Bankruptcy Rules, 1870, make service by post sufficient, and the notice must, at any rate, be deemed to have been served when it was delivered. Indeed, according to *Harris' Case* (2), it might be contended that the service of the notice was complete when it was posted. A mere threat to take possession is not enough. *Ex parte Montagu* (3) is the strongest case in favour of the Respondent, but there formal possession had been taken before notice of an act of bankruptcy.

(1) Law Rep. 3 Ch. 515. (2) Law Rep. 7 Ch. 587.
(3) 1 Ch. D. 554.

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Winslow, Q.C., and *Finlay Knight*, for the Respondent, were called upon only on the question of order and disposition :—

Argument.

If the creditor *bonâ fide* attempted to obtain possession of the property before he had any notice of an act of bankruptcy being committed by the debtor, that is sufficient. The protection given by sect. 94, sub-sect. 3, of the Act applies. Here the evidence is clear that *Arnold's* consent to the property remaining in *Wright's* possession was withdrawn before he had notice of the filing of the petition. That is enough. *Ex parte Montagu* (1) is conclusive in our favour. *Bird* v. *Bass* (2) is an authority that the mere delivery of a letter is not notice of an act of bankruptcy, unless there is a wilful abstaining from reading it.

Judgment, C. J. B.

BACON, C.J., said that the case went as near to the wind as any that he had ever seen. He could not hold that the execution of the bill of sale was of itself an act of bankruptcy, for the Appellant had not shewn that it comprised all the debtor's property. The goods, however, were left in the debtor's order and disposition with *Arnold's* consent until after the act of bankruptcy had been committed. The provisions of sect. 15, sub-sect. 5, of the *Bankruptcy Act*, 1869, had come into operation before any attempt was made to take possession, and the property in the goods had passed to the trustee, who was therefore entitled to the proceeds of sale. The decision of the County Court Judge must be reversed, but no order would be made as to the costs of the appeal.

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From this decision *Arnold* appealed. The appeal came on to be heard on the 13th of July.

Argument.

Winslow, Q.C., and *Finlay Knight*, for the Appellant:—

The Appellant did not receive notice of the act of bankruptcy until after he had demanded possession: *Bird* v. *Bass*. Taking possession of property comprised in a bill of sale without notice of an act of bankruptcy is a "dealing" with the bankrupt which is protected by sect. 94, sub-sect. 3, of the Act of 1869. In *Graham* v. *Furber* (3) it was held that a similar transaction was protected by sect. 133 of the Bankruptcy Act of 1849 (12 & 13 Vict.

(1) 1 Ch. D. 554. (2) 6 Man. & G. 143. (3) 14 C. B. 134.

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c. 106). The language of the two sections is in substance the same (1).

[They were stopped by the Court.]

Miller, Q.C., and *Francis Turner*, for the trustee :—

We contend that the bill of sale was in itself an act of bankruptcy as an assignment of the debtor's whole property in consideration of a then existing debt.

[MELLISH, L.J. :—You ought to have examined the debtor on that question.]

On the question of order and disposition, we contend that the Appellant had sufficient notice of the act of bankruptcy before he took possession. Moreover, the words "for valuable consideration" which are in sect. 94, and which were not in sect. 133 of the Act of 1849, must mean a money consideration, or at any rate some value, given at the time when the dealing took place, *i.e.*, in the present case, at the time when the possession was taken. We contend, also, that the letter of the 9th of March really amounted to notice of the act of bankruptcy. It must be taken to have been sent in pursuance of an understanding between *Wright* and *Arnold* that the former should give the latter notice

(1) Sect. 15 of the Act of 1869 provides that the property of the bankrupt divisible amongst his creditors shall comprise (*inter alia*), "(5.) All goods and chattels being, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, being a trader, by the consent and permission of the true owner, of which goods and chattels the bankrupt is reputed owner, or of which he has taken upon himself the sale or disposition as owner."

Sect. 94 provides that nothing in the Act contained should render invalid (*inter alia*), "(3.) Any contract or dealing with any bankrupt, made in good faith and for valuable consideration, before the date of the order of adjudication, by a person not having, at the time of making such contract or dealing, notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication."

The material portions of sect. 133 of the Act of 1849 are as follows :—

"All contracts, dealings, and transactions by and with any bankrupt really and *bonâ fide* made and entered into before the date of the fiat or the filing of a petition for adjudication of bankruptcy . . . shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, provided the person so dealing with . . . such bankrupt . . . had not at the time of such contract, dealing, or transaction . . . notice of any prior act of bankruptcy by him committed."

of his impending insolvency in time to enable him to take possession, and that would prevent the taking possession from being a *bonâ fide* transaction.

[MELLISH, L.J.:—That letter looks very like a fraudulent preference.]

Then, with reference to the notice which was sent off on the 10th of March, and delivered on the 11th, before it was delivered *Fisher* had done nothing more than make a demand for payment. A reasonable time must be allowed for compliance with the demand: *Toms* v. *Wilson* (1).

[BAGGALLAY, J.A.:—Suppose the man says, I cannot pay?]

Still something must be done to take possession, and this was not done until after the statutory notice must have been delivered at *Arnold's* office. It does not signify whether he read it, for rule 14 of the Bankruptcy Rules, 1870, permits service by post.

Winslow, in reply:—

The fair inference from the letter of the 9th of March is, that it was intended to prevent the creditor from taking any steps to perfect his security. At any rate, no inference adverse to the Appellant ought to be drawn from it when neither he nor *Wright* have been examined about it. It has often been decided that notice of an intention to commit an act of bankruptcy is not notice of an act of bankruptcy: *Ex parte Halifax* (2); *Brewin* v. *Short* (3); *Conway* v. *Nall* (4).

That a bill of sale holder has a right in case of the mortgagor's insolvency to take possession before the expiration of the time limited by the bill of sale for his so doing is shewn by *Ex parte Redfern* (5).

THE COURT reserved judgment, but afterwards intimated their wish that the debtor and his solicitor and *Arnold* should attend and be examined. They accordingly attended on the 20th of July, and were examined.

(1) 4 B. & S. 442, 455.
(2) 2 M. D. & D. 544.
(3) 5 E. & B. 227.
(4) 1 C. B. 643.
(5) 19 W. R. 1058.

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Arnold stated that he had no understanding with the debtor that he was to have notice in case the debtor was about to institute proceedings in the Court of Bankruptcy. He was surprised at receiving the letter of the 9th of March, as before that he believed that the debtor was in a position to meet his engagements. On receiving that letter he sent *Fisher* to consult his solicitor, and to ascertain whether the bill of sale had been properly registered. Till after the solicitor had been consulted he did not know that it was necessary for him to take possession, but believed that the registration was sufficient to perfect his title.

The debtor's solicitor stated that he did not send the letter of the 9th of March in consequence of any instructions from the debtor to do so. He sent a similar letter to the principal creditors, three in number, and it was his practice to send such a letter to creditors when he was about to file a liquidation petition.

The debtor stated that besides the property comprised in the bill of sale he had £400 coming to him under a contract which he was fulfilling at the time of its execution.

[JAMES, L.J.:—It is quite clear that the bill of sale did not comprise the whole of the debtor's property.]

Miller, in reply, as to the cases cited in reply:—

In all the cases where it has been held that notice of an intention to commit an act of bankruptcy is not notice of an act of bankruptcy, it will be found that when the notice was received the act of bankruptcy was still future. The debtor had still a *locus pœnitentia*. In the present case the act of bankruptcy was really a *fait accompli* before the notice was received. The petition had been signed on the 9th of March; there was nothing to do but to file it on the 10th, and the presumption is that it was filed before the letter was received.

Judgment, C. A. James, L.J. —

JAMES, L.J.:—

The evidence which has been given to-day has completely removed from my mind a grave doubt which I had felt as to the *bona fides* of the transaction which is in question. Now it appears that what took place was simply this. A creditor to whom his

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debtor had given a bill of sale, which had been duly registered, received notice that the debtor was about to commit an act of bankruptcy, and then he at once took steps to obtain possession of the property comprised in his bill of sale, and he succeeded in getting possession before he had any actual notice that the act of bankruptcy had been committed. I had at first a suspicion that the letter of the 9th of March was really an invitation on the part of the debtor, that it was tantamount to his saying, I am about to become a bankrupt, come and take possession of the property before I do so. If the thing had originated with the debtor, if it had been a purely voluntary act on his part, I should have had grave doubts whether the transaction could have been supported. But the evidence which has been given to-day shews, in my opinion, that everything was done *bonâ fide*, and the transaction cannot therefore be impeached. If the goods were in the debtor's order and disposition at the commencement of the liquidation, still they were taken out of it by means of a *bonâ fide* dealing with the creditor for valuable consideration before he had notice of any act of bankruptcy having been committed, and the transaction is within the protection given by sect. 94, sub-sect. 3.

MELLISH, L.J.:— Mellish, L.J.

I am of the same opinion. The Chief Judge decided the case upon the ground that the goods were at the time of the filing of the petition in the order and disposition of *Wright*, with the consent of *Arnold*, the true owner; and that, therefore, by virtue of sect. 15, sub-sect. 5, of the Act, they passed to the trustee. I agree with the Chief Judge that the goods were in *Wright's* order and disposition with *Arnold's* consent. But what we have to decide is whether the operation of the 5th sub-section of sect. 15 of the Act is modified by the 3rd sub-section of sect. 94. Now, before the passing of this Act, it was settled law upon the construction of sect. 133 of the Bankruptcy Act of 1849, that, if goods, which had been in the possession of a bankrupt with the consent of the true owner, were taken by him out of the bankrupt's possession after he had committed an act of bankruptcy, but before an adjudication of bankruptcy had been made, and at a

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time when the true owner had had no notice of the commission of the act of bankruptcy, this was a dealing and transaction with the bankrupt which was protected under that section; and we have now to decide whether there is any difference between the meaning of that section and the meaning of sect. 94, sub-sect. 3, of the present Act. Now, comparing the words of the two sections together, the first real difference is that the word "transactions" is omitted in the present Act, and that the provision is confined to "dealings" with the bankrupt. No one can suppose that this omission can make any difference in the construction. The draughtsman no doubt supposed that the word "dealings" had as extensive a meaning as the word "transactions." Every one who is familiar with the present Act knows that the language of the former Acts has been very much altered in many cases where it could not have been intended to make any change in the law. Then there is this other difference in sect. 94, that the words "for valuable consideration" have been introduced. In my opinion the present case is one in which a valuable consideration was given, for the bill of sale was founded upon a valuable consideration. I think that these words were only intended to exclude from the protection a mere giving away of the bankrupt's property. Probably under the former Act the same result would have followed, as it would have been held that a mere voluntary gift was not a *bonâ fide* transaction, but it was thought better to say this expressly. In my opinion a taking of goods out of the bankrupt's possession under the power conferred by a bill of sale which was originally given to secure a debt, is a dealing for valuable consideration, and is therefore within the protection of sect. 94. I agree with the Lord Justice that the letter of the 9th of March was sent *bonâ fide*. If it had been sent with the express intention of giving warning to the creditor to come and take possession, I am disposed to think that the transaction would not have been in good faith. But it is not necessary to decide this point, as the evidence shews that the letter was sent in good faith. The only other question is whether the letter amounted to notice of an act of bankruptcy. I think we ought to follow the authorities which have decided that notice of an intention to commit an act of bankruptcy is not notice of an

act of bankruptcy, and that an execution creditor who receives such a notice is not bound to stop in his proceedings, or to inquire whether an act of bankruptcy has been committed. Those decisions related to execution creditors, but they apply equally to the case of a holder of a bill of sale. In my opinion, therefore, this transaction is protected by sect. 94 (sub-sect. 3), and the Appellant is entitled to retain the proceeds of the goods which he seized.

BAGGALLAY, J.A.:— Baggallay, J.A.

I am of the same opinion. At the commencement of the liquidation the debtor's stock-in-trade, which was comprised in the bill of sale, was in his order and disposition with the consent of the Appellant, who was the true owner, and it passed to the trustee under sect. 15, unless it was protected by the provisions of sect. 94, sub-sect. 3. In order that it might be protected three things must have concurred. The seizure by the Appellant must have been made in good faith, for valuable consideration, and without notice of any act of bankruptcy committed by the debtor, and available against him for adjudication. Upon the evidence I am satisfied that the Appellant had had no notice of any act of bankruptcy. I am also of opinion that the seizure was made for valuable consideration, for I think that we must look at the transaction as a whole, and must have regard to the consideration for which the bill of sale was given. And, as to the question of good faith, I did entertain doubts about it, but they have been removed by the evidence which has been given to-day.

Solicitors for Appellant: *Bellamy, Strong, & Bennett.*
Solicitors for Trustee: *Walter, Moojen & Son.*

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SMITH *v.* GRINDLEY.

[1871 S. 131.]

SMITH *v.* CHARRINGTON.

[1875 S. 129.]

4 Ch D. 8.

Practice—Setting down Appeal—Production of Order—Refusal of Interlocutory Motion—Rules of Court, 1875, *Order* LVIII., *rr.* 8, 15. (1)

An appeal from the refusal of an interlocutory motion may be set down without production of the order appealed from, or a copy of it.

Order LVIII., rule 8, does not apply to such a case.

Statement.

ON the 30th of June Vice-Chancellor *Malins* refused a motion made on behalf of the Plaintiffs in these suits, and ordered that the Plaintiffs should pay the costs of the Defendants *Charrington*. On the 19th of July the Plaintiffs gave notice of appeal from the Vice-Chancellor's decision for the 24th of July. It being the duty of the Defendants' solicitors to draw up the order of the 30th of June, they obtained an appointment to settle it for the 18th of July. The order was left for entry on the 21st of July, and was entered on the 22nd of July, but the Plaintiffs' solicitors were unable to obtain an office copy of it until 4 P.M. on the 27th of July, though they made several applications for it. On the 28th of July the Plaintiffs' solicitors attended to set down the appeal, but the Registrar refused to set it down, because the day named in the notice of appeal (the 24th of July) had passed.

Whitehorne, on behalf of the Plaintiffs, now applied *ex parte* to the Court of Appeal for directions to set down the appeal.

Judgment.

JAMES, L.J. :—

The appeal must be set down. You cannot be deprived of your right to appeal by the delay of your opponents in drawing up the order. It is to be understood as a general rule that when an appeal is from the mere refusal of an application it is not neces-

(1) See

sary to produce the order appealed from, or a copy, in order to have the appeal set down.

MELLISH, L.J.:—

Rule 8 of Order LVIII. only applies where an order has been made, not where an application has been refused.

BAGGALLAY, J.A., concurred.

Solicitors: *Sheffield & Sons.*

V.-C. M. 1876 Feb. 10; March 23.

RICHMOND WATERWORKS COMPANY AND THE SOUTHWARK AND VAUXHALL WATERWORKS COMPANY *v.* VESTRY OF RICHMOND (SURREY).

[1875 R. 25A.]

Company incorporated by Act of Parliament—Delegation of Powers—Illegal Agreement—Public Health Act, 1875, *s.* 52—*Company able and willing to supply Water.*

A waterworks company is not, within the meaning of the 52nd section of the *Public Health Act*, 1875, able and willing "to supply water within the district of a local authority," unless it has both the necessary powers and the requisite supply of water.

Where company *R.* had the necessary powers but no water, and company *S.* had the requisite supply of water but no powers within the district, and company *R.* sold its plant to company *S.*, and certain members of company *S.* bought all the shares in company *R.* with the intention of allowing company *S.* to exercise the powers of company *R.*:—

Held, that the powers could not be so delegated, and that neither company was "able and willing" within the meaning of the Act, and consequently that neither was entitled to notice under the 75th section of the *Public Health Act*, 1848, or the 52nd section of the *Public Health Act*, 1875.

Section 75 of the *Public Health Act*, 1848 (11 & 12 Vict. c. 63), is not materially extended by sect. 52 of the *Public Health Act*, 1875 (38 & 39 Vict. c. 55), and therefore a local authority, desiring to construct waterworks, and having, before the passing of the latter Act, given the notices required by sect. 75 of the former Act, is not, in consequence of the passing of the latter Act, required to give the notices under sect. 52 of that Act.

Statement.

THE *Richmond Waterworks Company* was incorporated by a local Act of 5 & 6 Will. 4. c. lxxxi., intituled "An Act for supplying the Parish of *Richmond*, in the County of *Surrey*, with Water," which, after reciting that the parish "hath not at present a secure means of being supplied with water for domestic and other purposes, or in case of fire, but such inconveniences might be prevented, and much public benefit obtained, if proper waterworks were established," incorporated the company. And by the 8th section of the Act it was provided as follows: "And in order to enable the said company and their successors to obtain and have at all times a good and sufficient supply of water for the purposes of this Act, be it further enacted, that it shall and may be lawful for the said company and their successors to make and for ever hereafter to

maintain and keep a tunnel or aqueduct from the river *Thames* to the premises purchased by the said company as aforesaid, and thereby to take and supply from the said river such quantities of water as shall be requisite for the said undertaking and for supplying and keeping a sufficient supply thereof in the wells, reservoirs, and other works of the said company, and with such sluice gates and other appurtenances to the said tunnel or aqueduct as may be necessary and proper."

By the 23rd section of the Act it was provided as follows: "And be it further enacted, that in case the said company shall neglect or refuse to supply any of the said inhabitants occupying any private dwelling house in any square, street, close, or lane, where the pipes of the said company shall be laid with water for the use of his or her own family, at the rate or rent aforesaid, for the space of five days (after demand in writing shall have been made by such inhabitant to the secretary, clerk, engineer, or other servant of the said company for the time being, for such supply of water, and tender made to such secretary, clerk, engineer, or other servant, of the amount of the rate or rent as payable immediately in advance for such supply), the said company shall forfeit," &c., specifying certain penalties.

The *Richmond Waterworks Company* carried out the works required by their Act, and continued till the year 1860 to supply *Richmond* with water, which they drew from the *Thames* at a point a little above *Richmond*. About that time the water at their intake had become so deteriorated by various sources of pollution as to be no longer fit for use for domestic purposes, and many complaints were made by the inhabitants of *Richmond* as to its quality, and the company in consequence made some unsuccessful attempts to obtain water by means of an artesian well.

Applications were then made by a committee of the inhabitants of *Richmond* to the *West Middlesex*, *Grand Junction*, and *Southwark and Vauxhall Waterworks Companies*, who all drew their water from the *Thames* at some distance above the point of supply of the *Richmond Company* to lay on and supply water for the use of the parish of *Richmond*. This parish, however, was beyond the districts which any of these companies had powers under the Acts by which they were constituted to supply with water, and the

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Statement.

West Middlesex and *Grand Junction Companies* declined to extend their supply to *Richmond*.

The *Southwark and Vauxhall Company* was constituted by an Act of 9 & 10 Vict. c. lxix., and under its Parliamentary powers drew water from the *Thames* at *Hampton*, and in accordance therewith, its mains were carried through part of the parish of *Richmond*, but without the right or obligation to supply any part of the parish with water.

In August, 1860, some negotiations were commenced between the *Southwark* and the *Richmond Companies*, which resulted in their entering into a provisional agreement, subject to the sanction of Parliament, by a memorandum dated the 14th of December, 1860, for the purchase by the *Southwark Company* of the undertaking of the *Richmond Company* for £16,500.

In pursuance of this agreement the *Southwark Company* applied to Parliament in the next session to confirm the agreement, and vest in them the undertaking of the *Richmond Company*, and to extend their limits of supply to certain parishes which included *Richmond*. But, in consequence of opposition by the ratepayers of *Richmond*, made with the view of obtaining a reduction in the water rates proposed to be charged by the united companies, the bill was withdrawn. It was then arranged that, in substitution for the agreement of the 14th of December, 1860, certain of the shareholders in the *Southwark Company* should purchase in their own names, but really on behalf of the *Southwark Company*, the whole of the share capital of the *Richmond Company* at the price of £137 10*s*. for each £100 share, and the entire share capital was accordingly purchased and transferred into the names of shareholders in the *Southwark Company*.

From that time the two companies were as far as possible consolidated. There were no meetings of the board of directors, and no elections to fill any vacancies, and the secretary and other officers of the *Southwark Company* were appointed to the same offices in the *Richmond Company*. The name of the *Southwark Company* was also substituted for that of the *Richmond Company* at the office of the latter company at *Richmond*. Shortly afterwards the *Richmond Company* sold the land through which they had power to draw water from the *Thames*, and sold their mains,

pipes, and appliances to the *Southwark Company*. The demand notes for water rates and receipts for payments were from the same time made out in the name of the *Southwark Company*.

About the year 1870 the vestry having become dissatisfied both with the quality of the water supplied to them by the *Southwark Company*, and also with the amount of the rates, determined to take some steps towards effecting an improvement. Accordingly, after an ineffectual attempt to induce the *Southwark Company* to apply to Parliament for further powers to enable them to improve the supply of water to *Richmond*, the vestry passed resolutions which they afterwards served at the old office of the *Richmond Company* in *Richmond*, which since its absorption by the *Southwark Company* had been used as the *Richmond* office of that company, a notice in accordance with the 75th section of the *Public Health Act*, 1848, which, after reciting amongst other things that the limits within, for, or in respect of which the *Richmond Waterworks Company* had been established for supplying water included the parish of *Richmond*, and that the parish was not supplied with water proper and sufficient for all reasonable purposes for which it was required by the vestry and the inhabitants of the parish, and that the vestry, as the urban sanitary authority of the parish, were desirous that a proper and sufficient supply of water for all reasonable purposes should be provided for the use of the inhabitants of the parish, gave notice that the vestry, as the urban sanitary authority of the parish, were desirous of laying on or supplying water for the use of the inhabitants of the parish, and that the purposes for and the extent to which water was required for the vestry were as follows:—

"For private or domestic use by the inhabitants of the said parish, for use in coach-houses, stables, manufactories, breweries, laundries, and by persons carrying on any trade, occupation, or business whatsoever within the said parish, for extinguishing fires within the said parish, for the supply of fountains within the said parish, and, when deemed necessary, for flushing the public sewers within the said parish."

The notice then proceeded as follows:—

"The extent to which water is required by the said vestry for

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the purposes aforesaid is 600,000 gallons per day. Further, take notice that if you the said company do not within one calendar month from the date hereof inform the said vestry that you are both able and willing to lay on water proper and sufficient for all reasonable purposes for which it is required by the said vestry for the purposes aforesaid, and agree upon the terms on which you will supply such water, that then the said vestry will, under the powers in that behalf conferred upon them by the *Public Health Act*, 1848, proceed to provide their district with sufficient supplies of water for all or any of the purposes aforesaid by such means as in the said Act are mentioned or referred to."

This notice was sent on from the office of the *Southwark Company* at *Richmond* to the office of the *Southwark Company* in *Southwark*. Another copy, which was sent by post, addressed to the *Richmond Waterworks Company*, also reached the office in *Richmond*, and was there received by the collector for the *Southwark Company*.

A meeting of the vestry was held on the 7th of October, 1873, at which it was resolved that it was expedient for the urban sanitary authority to provide a sufficient supply of water for their district and for private use, and that the vestry, having decided to take the water supply of the town into their own hands, application be made to the *Southwark and Vauxhall Water Company* to ascertain whether and on what terms the company would sell to the vestry the mains and other pipes in the parish then used for the supply of the parish with water.

Application was made accordingly to the *Southwark Company*, but they declined to entertain any proposal with that object.

The vestry then prepared the plans and specifications of a scheme for the construction of an artesian well and other works estimated to cost £28,000, which they were advised would provide a suitable supply of water; and on the 28th of January, 1874, they resolved to submit the plans and specifications to the Local Government Board for their approval and for their sanction to the borrowing of the money required for carrying out the works from the Public Works Loan Commissioners.

The Local Government Board then appointed Major *Tulloch* their inspector to hold a local inquiry. This was held at the

Vestry Hall, at *Richmond*, on the 23rd and 28th of April, 1874 Neither the *Richmond* nor the *Southwark Company* appeared on the inquiry, but the *Southwark Company* presented a memorial to the Local Government Board, stating as follows :—

"That your memorialists have, ever since the year 1861, supplied the said town and parish of *Richmond* with water, having in the last-named year purchased the works and pipes belonging to a company then existing under the name of the "*Richmond Waterworks Company*," and which supplied the town of *Richmond* with water under the powers of an Act of Parliament.

"That the said *Richmond Waterworks Company* supplied the town only partially and inefficiently, and with water taken from the River *Thames* at *Richmond*, and delivered without filtration, and it was in consequence of strong representations from the medical practitioners of the town and the inhabitants generally that your memorialists undertook the supply and made the purchase above mentioned."

Some correspondence then took place between the Local Government Board with reference to the position of the *Southwark Company*, resulting in the determination of the board to allow that company to be heard before the Government inspector, the inquiry being reopened for that purpose. This further inquiry took place on various days between the 9th of November, 1874, and the 10th of May, 1875.

On the 24th of October, 1875, the clerk to the vestry received a letter addressed to him by the secretary to the Local Government Board, and dated the previous day, which was partly as follows :—

"Sir,—I am directed by the Local Government Board to state that they have had under their consideration the report made by their inspector, Major *Tulloch*, after his inquiry at *Richmond*, with respect to the application to the vestry of that parish acting as the urban sanitary authority, for the board's sanction to their borrowing £28,000 for works of water supply.

"The Board observe that it was contended at the inquiry that the parish is within the limits of supply of a water company empowered by Act of Parliament to supply water, and that the

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sanitary authority are not empowered, owing to the provisions contained in sect. 52 of the *Public Health Act*, 1875 (which is now substituted for the previous provisions of the Sanitary Acts on this subject), to supply water to their district.

"Having regard, however, to all the circumstances of the case so far as they are aware of them, the Board do not feel justified in withholding their sanction to the proposed loan, but the fact that this sanction is granted will not relieve the vestry from the responsibility of satisfying themselves that they are legally empowered to execute the works.

"The Board's formal sanction to the loan is herewith enclosed, and they direct me to state that they have recommended the Public Works Loan Commissioners to advance the money at 3½ per cent., under sect. 243 of the *Public Health Act*, 1875, the loan to be repaid within a period not exceeding thirty years.

"The Board may add that their power only extends to recommending the Public Works Loan Commissioners to make advances under the section referred to. It is for the Commissioners to determine whether they will act upon this recommendation, and the sanitary authority should communicate with them on the subject."

To the letter was appended the formal sanction of the Local Government Board to the loan.

In pursuance of a resolution of the vestry passed on the 27th of October, 1875, they, without serving any fresh notices under the *Public Health Act*, 1875, caused estimates to be prepared and tenders invited for carrying out the works; and on the 9th of November, 1875, they contracted with one *Joseph Simms* for the purchase of a piece of land.

The notices inviting tenders were advertised by the vestry, as the urban sanitary authority for *Richmond*, in several newspapers, and included the following objects:—

"1. The making of a well, and the construction of the works connected therewith.

"2. The construction of an engine and boiler-house.

"3. The construction and erection of steam-engines, boilers, and pumps.

"4. The construction of a service reservoir.

"5. The supply of cast-iron pipes.

"6. The laying and joining of cast-iron pipes, and the supplying and fixing of sluice-cocks, hydrants, &c."

Thereupon, on the 13th of November, 1875, Messrs. *Bircham & Co.*, as solicitors for the directors of the *Richmond* and *Southwark* companies, wrote a letter to the Vestry of *Richmond*, in which they called attention to the fact that the *Richmond Company* was empowered by Act of Parliament to supply water to *Richmond*, and had for many years past (in co-operation with and by the agency of the *Southwark and Vauxhall Company*) supplied, and was then supplying, and was able and willing to supply, the parish with water proper and sufficient for all reasonable purposes. They requested an immediate assurance that the vestry would not proceed further with the proposed works, at all events until the requirements as to notice and arbitration of the 52nd section of the Act had been complied with, and threatened to apply for an injunction to restrain the vestry from going on with their scheme. Further negotiations took place, but the vestry persisted in their claim, and the present action was ultimately commenced by the *Richmond Company* and the *Southwark Company* suing together as Plaintiffs.

They asked for an injunction restraining the *Richmond Vestry* from commencing, or proceeding to construct, waterworks in the parish of *Richmond*, unless and until they should have first given to the *Richmond Company* a written notice of the purposes for which and the extent to which, under the provisions of the *Public Health Act*, 1875, water was required by them as the urban sanitary authority for the parish, and unless and until, in case any difference should thereupon arise between them and the company as to whether the water which they were able to lay on was proper and sufficient for all purposes, or whether the purposes for which it was required were reasonable, or (so far as the charges of the company were not regulated by Parliament) as to the terms of supply, such difference should have been settled by arbitration in manner provided by the Act.

The *Southwark Company* had in the present session applied to Parliament for an Act extending their limits of supply so as to include the parish of *Richmond*.

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There were two points raised in the case. They were, first, whether the Plaintiff companies, or either of them, were or was at the commencement of the action a company able and willing to supply water to the parish of *Richmond* within the meaning of the 75th section of the *Public Health Act*, 1848 (1), as extended by the 51st section of the *Local Government Act*, 1858 (2); and,

(1) Section 75 of the *Public Health Act*, 1848 (11 & 12 Vict. c. 63), is as follows:—

"And be it enacted that the local board of health may provide their district with such a supply of water as may be proper and sufficient for the purposes of this Act, and for private use to the extent required by this Act; and for those purposes, or any of them, the said local board may from time to time, with the approval of the General Board of Health, contract with any person whomsoever, or purchase, take upon lease, hire, construct, lay down, maintain such waterworks, and do and execute all such works, matters, and things as shall be necessary and proper; and any waterworks company may contract with the local board of health to supply water for the purposes of this Act in any manner whatsoever, or may sell and dispose of, or lease their waterworks to any local board of health willing to take the same; and the said local board may provide and keep in any waterworks constructed or laid down by them under the powers of this Act a supply of pure and wholesome water, and the water so supplied may be constantly laid on at such pressure as will carry the same to the top story of the highest dwelling-house within the district supplied. Provided always, that before constructing or laying down any waterworks under the powers of this Act within any limits within, for, or in respect of which any waterworks company shall have been established for supplying water, the said local board shall give notice in writing to every waterworks company within whose limits the said local board may be desirous of laying on or supplying water, stating the purposes for and (as far as may be practicable) the extent to which water is required by the said local board; and it shall not be lawful for the said local board to construct or lay down any waterworks within such limits, if and so long as any such company shall be able and willing to lay on water proper and sufficient for all reasonable purposes for which it is required by the said local board, and upon such terms as shall be certified to be reasonable by the General Board of Health, after inquiry and report by a superintending inspector in this behalf, or (in case such company shall be dissatisfied with such certificate) upon such terms as shall be settled by arbitration in the manner provided by this Act; and in case any difference shall arise as to whether the water which any such company is able and willing to supply or lay on is proper and sufficient for the purposes for which it is required by the said Local Board, or whether the purposes for which it is required are reasonable, the same shall be settled by arbitration in the manner provided by this Act."

(2) Section 51 of the *Local Government Act*, 1858 (21 & 22 Vict. c. 98), is as follows:—

"The powers given to local boards by the 76th section of the *Public Health Act*, 1848, shall extend to any house within their district to which a supply

secondly, whether the notices given under the former Act were a sufficient compliance with the provisions of the 52nd section of the *Public Health Act*, 1875 (1).

In November, 1875, and with the view of strengthening their position for the purposes of the present action, an ostensible revival of the *Richmond Company* was effected, and a meeting of the board of directors tock place.

The Plaintiffs now moved for an injunction in accordance with the first paragraph of the prayer of the statement of claim.

J. Pearson, Q.C., *J. Beaumont*, and *Michael*, for the Plaintiffs :—

The *Richmond Company* were incorporated by Act of Parliament for the purpose of supplying *Richmond* with water, and they have ever since continued to carry out the objects for which they were incorporated. The only difference between the mode of supply at first adopted and that now followed is, that since the water at the *Richmond Company's* source of supply became unfit for use they have, under an arrangement with the *Southwark Company*, employed them as their agents to draw the water from the river at a place higher up than their own source of supply. The *Southwark Com-*

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of water can be provided at an expense not exceeding the water rate authorized by the said Act, or any local Act in force in the district, and notices under that section shall be served on owners of houses so supplied instead of occupiers, and expenses incurred under that section shall be recoverable from such owners."

(1) Section 52 of the *Public Health Act*, 1875 (38 & 39 Vict. c. 55), is as follows :—

"Before commencing to construct waterworks within the limits of supply of any water company empowered by Act of Parliament, or any order confirmed by Parliament, to supply water, the local authority shall give written notice to every water company within whose limits of supply the local authority are desirous of supplying water, stating the purposes for which, and (as far as may be practicable) the extent to which water is required by the local authority.

"It shall not be lawful for the local authority to construct any waterworks within such limits, if and so long as any such company are able and willing to supply water proper and sufficient for all reasonable purposes for which it is required by the local authority; and any difference as to whether the water which any such company are able and willing to lay on is proper and sufficient for the purposes for which it is required, or whether the purposes for which it is required are reasonable, or (if and so far as the charges of the company are not regulated by Parliament) as to the terms of supply, shall be settled by arbitration in manner provided by this Act."

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pany have a constant supply of water suitable in quality and quantity for the parish of *Richmond*, and through them the *Richmond Company* have continued to comply with the requirements of their Acts. The *Richmond Company* has not ceased to exist. Having been created by an Act of Parliament, its existence can only be terminated by the same authority. The only change effected in the constitution of the company by the arrangement with the *Southwark Company* is, that certain shareholders in the *Southwark Company* have bought up the shares in the *Richmond Company*, and that for the purposes of supply the *Southwark Company* represent both companies, and are the agents of the former. It is not a case of amalgamation as in *Shrewsbury and Birmingham Railway Company* v. *Stour Valley Railway Company* (1), and *Stace and Worth's Case* (2). So long as water is in fact supplied, it makes no difference to the inhabitants of *Richmond* whether the water is taken from the *Thames* at *Richmond* or higher up the river, except that at the latter place it is purer. But if necessary, the Plaintiffs have still power to take water from the *Thames*, or by means of an artesian well. It is quite immaterial whether there are directors who were legally elected if there were directors in fact: *Scadding* v. *Lorant* (3); *In re County Life Assurance Company* (4).

Secondly, the vestry are not entitled to take measures to supply themselves till they have complied with the requirements of sect. 52 of the *Public Health Act*, 1875, and given to the Plaintiff companies the notice thereby required. This section is wider in its scope than sect. 75 of the *Public Health Act*, 1848. The powers conferred by the 52nd section of the *Public Health Act*, 1848, were limited to supplying water for the purposes mentioned in the Act, which are those specified in sects. 46 and 76, namely, for sewerage purposes and cleansing of streets, slightly extended by sect. 51 of the *Local Government Act*, 1858. But the purposes for which power is conferred by sect. 52 of the *Public Health Act*, 1875, to supply water are practically unlimited, and it may well be that the Local Government Board would have granted authority to obtain water for the limited purposes of the previous Acts, and not for the ex-

(1) 2 D. M. & G. 866. 17 Jur. 845. (3) 3 H. L. C. 418.
(2) Law Rep. 4 Ch. 682. (4) Law Rep. 5 Ch. 288.

tended objects. All the powers the vestry obtained under the inquiry before Major *Tulloch* were for constructing the waterworks allowed by the previous Acts, and could not authorize them to construct works for the more extended objects. The vestry must serve the notices required by the Act of 1875, and a further inquiry must take place as to the ability of the Plaintiff companies, and if necessary, there must be an arbitration as to the amount of the rates. The notice to the Local Government Board itself differs widely from that which would be required under the Act of 1875. It was not a legal notice under that Act. Notices are always construed strictly against the parties giving them, as in the case of a notice to a tenant to quit: *Doe* v. *Lea* (1); *Goode* v. *Howells* (2).

Glasse, Q.C., for the vestry, commenced by referring to the application to Parliament by the Plaintiff companies, when the Vice-Chancellor said that, inasmuch as the passing of the Act applied for might render the present application unnecessary, the motion had better stand over till the bill had been either passed or disposed of.

March 23. The bill brought into Parliament by the Plaintiff companies having been withdrawn by the promoters, the motion was now brought on again.

Glasse, Q.C., *Meadows White*, and *A. Glen*, for the vestry of *Richmond*:—

The *Richmond Company* is now practically defunct, and the *Southwark Company* has no power to supply the inhabitants of *Richmond* with water.

The *Richmond Company* has by its acts deprived itself of being in the position of a company able and willing to supply the parish with water. And the *Southwark Company* have no right to take from the *Thames* at *Hampton* more water than is required for the places which they are bound to supply with water, and which they have a right to supply. The *Southwark Company* would have no answer to a suit against them by the Conservators of the *Thames*

(1) 11 East. 312. (2) 4 M. & W. 198.

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or any other body to restrain them from supplying water to the *Richmond Company.*

It is also a fatal objection to the Plaintiffs' claim that the *Richmond Company* had no power to delegate its powers, and the attempt to do so is illegal: *Great Northern Railway Company* v. *Eastern Counties Railway Company* (1). The question really is, whether there is a company able and willing to supply the parish with water, and there can be no reasonable doubt that there is not. The *Richmond Company*, as constituted by their Act, had not sufficient capital or powers to enable them to carry out the necessary works, and they ought to have applied to Parliament for further powers if they wished to put themselves in a position to carry out their obligations.

As to the question of giving a second notice in consequence of the passing of the *Public Health Act*, 1875, it is clear that it is not necessary. There is no substantial difference between the enactments, and the grounds on which the application was granted apply equally to the provisions of both Acts.

J. Pearson, in reply:—

If the vestry have a grievance in consequence of the changes in the constitution of the *Richmond Company*, it is one quite *absque damno*, and therefore gives them no title to relief. Moreover, the changes were made quite consistently with the powers given by the Acts of Parliament. The case cited to shew the illegality of what has been done is *Great Northern Railway Company* v. *Eastern Counties Railway Company.* But if it were necessary to object to that case, it might be said that it was heard in vacation, and could not be treated as a fully considered case. But it has really nothing to do with the present case. It was the case of a bill for an injunction to restrain a party to an agreement from doing things contrary to it, and the Court simply declined to aid the party applying. Where a third party comes to the Court, the case is different. That point arose in *Midland Railway Company* v. *Great Western Railway Company* (2), where there was a third party setting up the illegality of an agreement between two contracting parties, which did not interfere with the action of the

(1) 9 Hare, 306. (2) Law Rep. 8 Ch. 841.

third party, and that distinguished it from *Beman* v. *Rufford* (1), and the other cases in which agreements were held illegal on the ground of such interference. If *Great Northern Railway Company* v. *Eastern Counties Railway Company* (2) goes the length suggested by the vestry, it must be considered as overruled by *Midland Railway Company* v. *Great Western Railway Company* (3). There is, in this case, no real delegation of powers, and all that has been is quite *intra vires*. In order to set aside an agreement of this kind, something must be shewn on its face foreign to the objects of the companies: *Hare* v. *London and North Western Railway Company* (4). In entering into this arrangement the *Richmond Company* was simply carrying out the duty of securing the best possible supply of water for the parish. Its primary object was to supply *Richmond* with water, and incidentally there was power given to draw water from the *Thames*. But it was open to the company to obtain water otherwise, as by sinking an artesian well, or by such an arrangement as has been made with the *Southwark Company*. And it is not competent to parties outside the agreement to say that such an arrangement is illegal, so long as the primary object of the company is secured: *Shrewsbury and Birmingham Railway Company* v. *Stour Valley Railway Company* (5).

MALINS, V.C., after referring to the facts of the case continued:—

The *Richmond Company*, having handed over all their powers as far as they could, although legally continuing to exist, practically ceased to do so from that time, and the minute book shews that there was a meeting of the directors upon the 20th of March, 1862, and that from that day down to the 26th of November, 1875, there were no directors and no meetings.

That is quite consistent with the case that was presented to me on behalf of the Defendants, that no directors were elected, and no meetings held, because in point of fact the *Richmond Company* had, as far as they could, sold everything they had to the *Southwark Company*. It has been proved that whereas up to 1862 the demands for water rates were made in the name of the *Richmond*

(1) 1 Sim. (N.S.) 550.
(2) 9 Hare, 306.
(3) Law Rep. 8 Ch. 841.
(4) 2 J. & H. 80.
(5) 2 D. M. & G. 866.

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Company, from that time the demands were made in the name of the *Southwark Company*, and the *Southwark Company*, when they proceeded to exercise the power of opening streets, lanes, and so forth, were the parties who gave the notice, and if on some occasions they professed to give it on behalf of the *Richmond Company*, it was the officers of the *Southwark Company* who did these things, and the *Richmond Company* had, in point of fact, practically ceased to have any existence. I say "practically" as distinguished from "legally," because, as I have already said, "legally" they no doubt had and still have an existence. This state of things continued till towards the end of the year 1873, though in the meantime complaints were made on the part of the inhabitants of *Richmond* on account of the great increase in the rates charged, and of insufficient supply, and unsatisfactory quality of the water. Application was then made for assistance to the Public Works Loan Commissioners, and they, having been satisfied that the construction of the works proposed was proper, having due regard to the interests of the inhabitants of *Richmond*, authorized a loan of £28,000 for the purpose at 3½ per cent. These circumstances are very strong in favour of the right of the vestry to construct their own waterworks; but this is a motion for an injunction to prevent their doing so. Now, whatever privileges are conferred upon the *Richmond Company* by the Act of 1835, there is no provision in it that no other waterworks company shall be established there by another Act of Parliament, or in any other way. They are in the same position as a railway company which cannot, by running over a certain district, claim the right to prevent any other railway from running in the same direction. Independently of other Acts of Parliament to which I am about to refer, there is no monoply, but by virtue of them the *Vauxhall Company* and the *Richmond Company* claim a monoply in the supply of water to *Richmond*. This claim, first of all, depends upon the *Public Health Act*, 1848, which was in force on the 23rd of August, 1873, when the vestry first proceeded to give the notices as they were bound to give.

[His Lordship then read the 75th section of that Act, and continued:—]

Mr. *Pearson*, in opening this case, referred to the *Public Health Act*, 1875, but I do not find any very material difference between the

two enactments. The Act of 1875 may be considered as laying down the law to the same effect, that the urban sanitary authority, that is in this case the vestry of *Richmond*, may provide the district or any part thereof, and any rural authority may provide their district, with a supply of water proper and sufficient for public and private purposes, and for those purposes may construct and maintain waterworks, dig wells, and so on; and that is what the *Richmond* vestry propose doing. Then they may take on lease or hire any waterworks, or purchase any waterworks, or any water, or right to take or convey water, either within or without their district, and any rights, powers, and privileges of any water company.

[His Lordship then read the latter part of the 52nd section of the *Public Health Act*, 1875, and continued:—]

Now, as I have already said, there are two things which must concur in order to secure to a waterworks company a monopoly as against the sanitary authority. If there is an existing company able and willing to give a good supply of water, such as is required by the Legislature, then in that concurrence of circumstances they are entitled to the monopoly; but if there is a company having merely a legal existence, and not able and willing to give that supply, no such monopoly is given.

Now, with regard to the present case, there is the fact that the *Richmond Company*, in 1861, sold to the *Southwark Company* all the works and pipes belonging to them then existing, and which supplied the town of *Richmond* with water under the powers of this Act of 1835, and also disposed of their land. It is as plain as anything can be that the *Richmond Company*, by the sale of their pipes, mains, land, and effects, have absolutely disabled themselves from supplying *Richmond* with water. They therefore *qua Richmond Company* are not able. They may be willing, but they are not able, and they must be both able and willing. But then they say (I suppose intending to adopt the legal maxim, *Qui facit per alium, facit per se*), "Although we do not do it, we have done it by our agents"—that is, the *Southwark Company*. The answer to that is, that the *Southwark Company* is a distinct company, created by different Acts of Parliament, having limited powers

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unquestionably, and no powers at all at *Richmond*. I have already intimated my opinion that there is nothing unreasonable, though it may not be legal, when the *Richmond Company* found themselves unable to do this themselves, in their applying to an adjoining company, whose pipes were laid through or near *Richmond*, to turn the water into *Richmond*, so as to give a better supply than they could give from a lower part of the *Thames*. Then comes the question, whether one company can delegate to another its powers, and can arm that company with the powers which itself relinquishes. Upon the former occasion, the decision of Sir *G. Turner* in *Great Northern Railway Company* v. *Eastern Counties Railway Company* (1) was appealed to, and Mr. *Pearson* this morning referred to a great many other authorities—for instance, *Shrewsbury and Birmingham Railway Company* v. *Stour Valley Railway Company* (2), which he so much relied upon, but that appears to me to be a totally distinct case. That was a case in which several railway companies had the power amongst them of running over a large tract of country, and the consequence of their running in opposition was to destroy each other. Thereupon they came to an arrangement that they would throw the common earnings into one purse, and divide them in certain defined proportions. There was nothing illegal in that, and the contract was decided by the Court of Queen's Bench not to be illegal. But where one company attempts to transfer all its powers, privileges, and authorities to another company, then I apprehend it does fall within the rule laid down by Sir *G. Turner*, which I have heard no authority to refute, and in which I entirely agree. In the case of the *Great Northern Railway Company* v. *Eastern Counties Railway Company* there was an agreement between two railway companies, made without the authority of the Legislature, whereby one of them delegated to the other all the powers which had been conferred upon it by Parliament, and it was held that it was an unlawful attempt to effect that which Parliament alone could authorize, and was against public policy, and in such a case the Court would not interfere to assist either of the parties in obtaining a collateral benefit which the agreement would give, or aid them in any manner which would promote the object

(1) 9 Hare, 306. (2) 2 D. M. & G. 866.

of the agreement. Sir *G. Turner* says (1): "If, therefore, this case had rested wholly upon the construction of the agreement between the Plaintiffs and the Defendants, I should have thought it the duty of the Court to interfere to some extent by injunction; but I think there lies at the root of this case a question of public policy, which precludes the interference of the Court. It is impossible to read the agreement between the Plaintiffs and the *East Anglian Railways Company* without being satisfied that it amounts to an entire delegation to the Plaintiffs of all the powers conferred by Parliament upon the *East Anglian Company*. All the stock of that company is to be taken by the Plaintiffs without any obligation to restore it. The Plaintiffs are to manage and regulate the railways of the *East Anglian Company*, for the purposes of the agreement; and although in form it is declared that the instrument shall not operate as a lease or agreement for a lease, it amounts in substance either to one or the other. It is framed in total disregard of the obligations and duties which attach upon these companies; and is an attempt to carry into effect, without the intervention of Parliament, what cannot lawfully be done except by Parliament in the exercise of its discretion with reference to the interests of the public." In this case every power that the *Richmond Company* had is attempted to be transferred, and, as I have already said, when the streets were opened the notices were served by the *Southwark Company*, or when the rates were levied they were levied by the *Southwark Company*, and it is the *Southwark Company* who demand the payment of the rates, and receipts are given by them.

I would say here it is extremely remarkable that for thirteen years this state of things should have gone on without any legal proceedings being instituted, because it does seem to me perfectly plain that the *Southwark Company* when they made out their charges could not have enforced them, because any ratepayer might have disputed their right to make the charges.

I have already said that the case lies in a very narrow compass, and depends entirely upon the question whether this company, being admittedly a legally existing company, is one able and willing to supply the district. How can they be able to supply

(1) 9 Hare, 310.

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the district when the only means they had of supplying it was from the River *Thames* at a particular place, and that is now closed against them by their own act? How can they be able to do this when they have no power whatever of getting water anywhere except by what is in effect buying it from the *Vauxhall Company?*

The Legistature having by an Act of Parliament secured to an existing waterworks company, in the district in which the proposed works had to be erected, a monopoly upon certain conditions, I think, upon general principles, that the persons who are claiming that monopoly are imperatively bound to shew that they have performed every part of the conditions in such a manner as shall leave no doubt in the mind of the Court; and it seems to me, upon the principle laid down by Sir *George Turner*, that the *Richmond Company* have deprived themselves of the right to this monopoly by attempting to transfer their powers to another company which cannot exercise the powers conferred upon the original company, and which the original company, for the reasons I have stated, have entirely deprived themselves of the power of exercising.

Upon these grounds, therefore, I come to the conclusion that the case made by the Plaintiffs has failed.

The vestry, being dissatisfied with the supply, have, in my opinion, the right to proceed to erect new works, unless the company represented by Mr. *Pearson* can distinctly establish a state of things which entitles them to say, "We have the monopoly, and no man shall interfere with us;" but that, in my opinion, they have failed to do, and consequently the motion must be refused with costs.

Solicitors: *Bircham & Co.; Montagu Scott.*

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April 29; *May* 6.

[1875 M. 173.]

Statute of Limitations—Common Law Procedure Act, 1852, *s.* 11—*Administration Suit.*

A creditor issued a writ in the Common Pleas against an administrator for a debt not then barred by statute. Within six months after the issuing of this writ (which was never served), at which time the debt was barred unless saved by the writ, the creditor took out an administration summons:—

Held, that the writ only saved the bar for six months in the Court of Common Pleas, and that the statute was a bar to the administration suit.

18 Ch. D 53

Statement.

THIS was an adjourned administration summons taken out by *Charles Fievet*, a Frenchman, claiming to be a creditor under the letters of administration of *John Richard Manby*, who died on the 19th of March, 1869, and which were granted to the Defendant, *Charles Manby*, his sole legal personal representative, on the 28th of April, 1869.

The claimant was the representative of Madame *Drolling*, a French creditor of the deceased, *J. R. Manby*, and the claim was for 29,329f., or £1173, in respect of bills of exchange. The interest upon this debt was paid to Madame *Drolling* up to the death of *J. R. Manby*, and she was then informed by the Defendant that there were no assets available to discharge her claim, in consequence of the Defendant having appropriated all the assets of the deceased in part payment of a debt due from the deceased to the Defendant. Madame *Drolling* died in November, 1870, and the matter remained in abeyance till the year 1872, when application was made to the Defendant for payment of the money by a person named *A. Wolff*, on behalf of the Plaintiff.

The present administration summons was taken out on the 6th of July, 1875. The Defendant pleaded to the summons the *Statute of Limitations*, and also his right of retainer in respect of the debt due to him. To this defence the Plaintiff replied that his agent *Wolff* had, on his behalf, issued a writ in the Common Pleas against the Defendant on the 7th of January, 1875, being within six years from the death of *J. R. Manby*, and submitted

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that the present summons having been taken out on the 6th of July—that is, within six months of the issuing of the common law writ—that was sufficient continuance of the writ under the *Common Law Procedure Act*, 1852 (15 & 16 Vict. c. 76, s. 11), to keep the debt alive and to bar the statute.

Argument.

A. H. Simpson, for the Plaintiff:—

The issuing of the writ in the Common Pleas within six years barred the *Statute of Limitations*, and as the administration summons was taken out within six months from that time, which is the period allowed by the *Common Law Procedure Act* for the currency of the writ, the plea of the statute cannot be upheld. The administration summons is a sufficient continuance of the writ to prevent the operation of the statute: *Pratt* v. *Hawkins* (1); *Berrington* v. *Evans* (2); *Sterndale* v. *Hankinson* (3).

Glasse, Q.C., and *Warmington*, for the Defendant:—

The writ issued on behalf of the Plaintiff was never served on the Defendant, and was not kept alive in the manner provided by the *Common Law Procedure Act*, and is therefore no answer to a plea of the *Statute of Limitations* in a totally distinct proceeding like the present; and the date of the administration summons was, therefore, the first process served upon the Defendant, and is, to all intents and purposes, the commencement of the action, and consequently not within the six years allowed by the statute. The Defendant is, therefore, entitled to have the summons dismissed.

Judgment.

MALINS, V.C.:—

This summons raises a very curious question, and, as far as I know, there is no instance to be found of the point having before been decided. The facts are, that one *J. Manby* became a debtor, as it is admitted, to the Plaintiff for a sum of £1181. Interest was paid upon the debt up to the death of the debtor, which took place on the 19th of March, 1869. Administration was taken out on the 28th of April, 1869, and the Plaintiff, on the 7th of January, 1875, issued a writ in an action against the Defendant, which

(1) 15 M. & W. 399. (2) 1 Y. & C. Ex. 434.
(3) 1 Sim. 393.

is admitted to have been within the six years from the liability for the debt. That writ having been issued on the 7th of January, 1875, by the 11th section of the *Common Law Procedure Act*, 1852, it remained in force for six months, and it expired on the 6th of July. As the clock struck twelve on the night of the 6th of July that writ would have been at an end; but on that 6th of July the Plaintiff took out a summons in my Chambers which is now under my consideration, and the question is whether, when the summons was taken out, there was an existing debt which could be enforced by proceedings in equity, or whether or not the debt had become barred by the *Statute of Limitations*.

Now to this extent I take it the law is clear: the action having been commenced in the Court of Common Pleas, if the writ had been renewed in that action in the Common Pleas, the Plaintiff might have gone on; he might have renewed those proceedings instead of commencing proceedings in equity on the 6th of July, and in that action he might have recovered the debt; but instead of doing so he drops it altogether, and commences proceedings in equity. The *Statute of Limitations* is now set up, and the question is, therefore, whether this can be still considered a debt, or whether it is kept alive only for the purpose of the particular action commenced within the six years. I was referred to *Sterndale* v. *Hankinson* (1), which I have read since the argument last Saturday, but that, I think, cannot be considered as any authority for the proposition sought to be maintained, because that was a suit instituted by a creditor on behalf of himself and all other creditors, but I have not been able to find any precedent for a debt having been kept alive by issuing a writ, for the purpose of proceedings in another Court than that in which the writ was issued. Now, upon principle, every Court, both of law and equity, is bound, and it is the duty of this Court to give effect to the *Statute of Limitations*, whether it relates to land, or to simple contract debts, or specialty debts, or any other debt, it is the duty of the Court to sustain it on broad principles which cannot be disputed. There was no excuse in this case for having had recourse to this forum, because if there was a good debt, the proper course was to have gone on with that action, and if in that action judg-

(1) 1 Sim. 393.

V.-C. M. 1876 MANBY v. MANBY. Judgment.

ment had been recovered, that judgment would have been conclusive evidence of the debt here, and the suit could have been maintained.

After all, it is by a pure fiction of law that the issuing a writ for a debt not barred by the statute should keep alive the right to recover the debt, although the person against whom the writ is issued knows nothing about it; still, if this has been decided, and and if by such means a debt can be kept alive by issuing a writ every six months for a series of years, it must be subject to the restrictions put upon it. What, then, are the restrictions put upon it by the 11th section? First, it is enacted that no original writ of summons shall be in force for more than six months from the day of the date thereof, including the day of such date; but if any Defendant therein named may not have been served therewith, the original or concurrent writ of summons may be renewed at any time before its expiration for six months from the date of such renewal, and so from time to time during the currency of the renewed writ.

Now, does that mean that it keeps alive the debt for all purposes, so that it can be enforced in any Court, or does it mean that it keeps it alive for that particular action only? If in this particular case, instead of coming to the Court of Chancery for an administration decree, the Plaintiff had gone to the Court of Exchequer or the Queen's Bench, he would have been met by the plea provided by the Act, which is what it was intended for—it could have been pleaded in the Queen's Bench or the Exchequer that the alleged cause of action did not arise within six years. That is a conclusive plea if true, and the only way in which the Defendant could have got rid of that would have been that he had commenced an action in the Common Pleas, and that is the very question I have now to decide under the words of the section, whether the alleged debt was incurred more than six years before the institution of this suit. The administrator says the cause of action, namely, the debt, arose more than six years before the commencement of this suit. The only answer is: Very true, it did occur six years before the commencement of this suit, but we had commenced a suit in another Court. But commencing the suit in another Court is, in my opinion, only a mode of keep-

ing alive the debt in that particular action. I am therefore of opinion that, though in some sense the debt is kept alive by the issuing of the writ, it was only kept alive for the purpose of being recovered in that particular Court in which the writ was issued, and the words of the 39th section, schedule B, of the *Common Law Procedure Act*, "that the alleged cause of action did not accrue within six years before the suit," will now be a conclusive answer in the Court in which the proceedings have been taken for the recovery of the debt, and the right of action cannot go beyond the period of time limited by the Act.

I am therefore of opinion that the *Statute of Limitations* is a complete answer to this claim, and that it therefore cannot be sustained, and must be dismissed with costs.

Solicitors for Plaintiff: *Wilkinson & Howlett.*
Solicitor for Defendant: *Beattie.*

V.-C. H.
1876
April 6.

ROLFE *v.* MACLAREN.

[1876 R. 43a.]

Practice—Judicature Acts—Counter-Claim—Reply—Joinder of Issue generally—Motion for Account—Striking out or amending Reply—Rules of Court, 1875, *Orders* XXXIII.; XL., *rr.* 10, 11; XIX., *rr.* 10, 17, 20; XXII., *r.* 10; XXVII., *r.* 1; LIX.

BCD. 56

A reply joining issue generally will not, upon the application of the Defendant, be ordered to be struck out or amended either under Order XXVII., rule 1, or Order LIX., because it does not deal specifically with the allegations of a counter-claim.

The "balance in favour of the Defendant" mentioned in Order XXII., rule 10, in case a set-off or counter-claim is established against the claim, is the balance upon the hearing of the action.

In an action for an account of rents and profits, the Defendant delivered a defence and a counter-claim to set off money due to him from the Plaintiff under an award. The Plaintiff in his reply simply joined issue generally, and the Defendant then, treating the counter-claim as admitted, moved under Order XXXIII. and Order XL., rules 10 and 11, for an account of what was due to him under it, or in the alternative that the reply might be struck out or amended under Order XXVII, rule 1, as tending to embarrass, and as being a non-compliance with the Rules of Court within Order LIX. :—

Held, that the case was not one for an account under Order XXXIII.; that no order could be made on the counter-claim before the principal claim of the Plaintiff was dealt with; and the alternative order refused on the ground that a Defendant could not dictate to a Plaintiff the nature of his pleadings.

Statement.

THIS was an action by a person claiming an interest in real estate, against the person in possession of the estate, for an account of rents and profits, and other relief; and the Defendant delivered a defence, and a counter-claim to set off money due to him from the Plaintiff on an award made in his favour. The Defendant did not deliver any specific reply to the counter-claim, but by his reply joined issue generally.

Daniel Jones, for the Defendant, now moved under Rules of Court, 1875, Order XXXIII., and Order XL., rules 10 and 11, for an account of what was due to the Defendant under the counter-claim.

Order XIX., rule 10, required a Defendant who sought to rely on any facts as supporting a right of set-off or counter-claim to state

specifically in his statement of defence that he did so by way of set-off or counter-claim; and by Order XIX., rule 20, it is not sufficient for a Defendant in his defence to deny generally the facts alleged by the statement of claim, or for a Plaintiff in his reply to deny generally the facts alleged in a defence by way of counter-claim, "but each party must deal specifically with each allegation of fact of which he does not admit the truth."

Statement.

Now the Defendant had complied with these rules; but the Plaintiff had not, for he had, instead of dealing specifically with the allegations of the counter-claim, merely joined issue generally. He must, therefore, be taken to have admitted the counter-claim, so as to entitle the Defendant to an account of what was due under it, and to have judgment under Order XXII., rule 10, for the balance due to him as upon an established counter-claim.

In the alternative, however, the Defendant is entitled under Order XXVII., rule 1, to have the reply struck out or amended, as tending to prejudice, embarrass, or delay the trial, for the Plaintiff has not complied with Order XIX., rule 20; and under Order LIX. non-compliance with any of the rules renders a party liable to have his proceedings amended or set aside as irregular, or to have them otherwise dealt with as the Court shall think fit.

Phear, for the Plaintiff:—

Argument.

A simple joinder of issue cannot amount to an embarrassing plea; and a Defendant cannot compel a Plaintiff to deal specifically with the allegations of a counter-claim, or oblige him to adopt any particular course or method of pleading. A Plaintiff can if he chooses join issue in this manner upon a counter-claim, and although such a joinder of issue admits the facts alleged in support of the counter-claim, the Defendant cannot do more than set off the amount due under the award against the claim of the Plaintiff; and this he must do at the hearing, for he cannot turn himself into a Plaintiff and claim a judgment for the amount of his counter-claim without regard to the principal claim of the real Plaintiff.

The counter-claim must be dealt with under Order XIX., rule 3, at the same time as the original claim, and whatever, upon the hearing of the action, the Defendant can establish by way of cross-

V.-C. H. 1876 ROLFE v. MACLAREN.

claim, that he can set off against the original claim; for "the balance" mentioned in Order XXII., rule 10, is the balance at the hearing. Moreover, the Defendant has shewn no case for an account at all, as the award on which he relies ascertained the amount due to him.

Daniel Jones, in reply.

Judgment.

HALL, V.C.:—

I cannot give judgment on the counter-claim without dealing with the Plaintiff's case as well, for the "balance" mentioned in Order XXII., rule 10, is clearly the balance which results upon the hearing of the action. The present case does not appear to be one in which it is requisite, or would be proper now to make any order upon the counter-claim, and it is not at all a case for directing an account under Order XXXIII. There may be a small amount of interest to be computed, but the amount of principal due to the Defendant was settled by the award, and he will only be entitled to set off the amount of the counter-claim when the amount of the Plaintiff's claim is ascertained.

The other Orders referred to have no bearing upon the case, for the alternative application, that the Plaintiff's reply may be amended or struck out, is, in my opinion, idle. I cannot allow a Defendant to amend a Plaintiff's pleadings, or rather to compel a Plaintiff to amend his own pleadings, in any way the Defendant thinks proper. The application will, therefore, be refused with costs.

Solicitors: *J. P. Murrough; Allen & Son.*

FARQUHARSON *v.* FLOYER.

V.-C. H.
1876
April 25.

[1871 F. 49.]

Marshalling Assets—Pecuniary Legacies—Residuary Devises—Insufficient Personalty—Hensman v. *Fryer not followed.*

Where there is a bequest of pecuniary legacies and devises of real and residuary real estates, and an insufficient amount of personalty for the payment of debts, the pecuniary legacies must be first resorted to to make up the deficiency.

Collins v. *Lewis* (1), *Dugdale* v. *Dugdale* (2), and *Tomkins* v. *Colthurst* (3), followed; and *Hensman* v. *Fryer* (4) not followed.

Statement.

THE testator in this case, by his will and the codicils thereto, after bequeathing several pecuniary legacies, devised a real estate to the trustees, and directed them to sell the same and apply the proceeds in aid of the personalty in the payment of his debts, and then devised another real estate in strict settlement to one son, and his issue, and another real estate, and also his residuary real estate, to another son in strict settlement, and his issue. There was an insufficiency of the personalty even with the addition of the proceeds of the devised real estate which was directed to be sold.

Argument.

Hastings, Q.C., and *Macnaghten*, for the Plaintiffs, submitted that the decision in *Hensman* v. *Fryer*, in which it was held by Lord *Chelmsford*, reversing the judgment of Vice-Chancellor *Kindersley*, that the legatee of a legacy of £2000 and the residuary devisee were liable to contribute to the debts of the testator, which his general personal estate was insufficient to satisfy, according to the respective values of the legacy and of the estates devised, ought to be followed in this case, and that personal estate and the residuary real estate ought to be applied proportionately in payment of the debts, notwithstanding that Vice-Chancellor *Stuart*, in the case of *Collins* v. *Lewis*, held that a pecuniary legatee had no right whatever to call upon a residuary devisee to contribute to the payment of debts, and said that the decision in the case of *Hensman* v. *Fryer* was clearly a mistaken decision, and declined to

(1) Law Rep. 8 Eq. 708.
(2) Ibid. 14 Eq. 234.
(3) 1 Ch. D. 626.
(4) Law Rep. 3 Ch. 420.

V.-C. H. 1876 FARQUHARSON v. FLOYER. Argument.

follow it; and that Vice-Chancellor *Malins*, in the case of *Dugdale* v. *Dugdale* (1), had said that the point as to marshalling the deficiency between the legacy and the real estate was decided in *Hensman* v. *Fryer* (2) under a misapprehension as to the effect of the decision in *Tombs* v. *Roche* (3), and therefore he refused to follow it. Since those cases were decided, the case of *Lancefield* v. *Iggulden* had come before the Courts. The main question there was whether specifically devised estates were liable to contribute rateably with the residuary real estate to meet the deficiency of the personal estate, and Vice-Chancellor *Bacon* held (4) that they were not liable to contribute till the real estate comprised in the residuary devise had been exhausted; but on appeal Lord *Cairns* remarked (5): "I feel bound to say that I look upon *Hensman* v. *Fryer*, decided by Lord *Chelmsford*, as a direct decision on this particular point. It was a most carefully considered judgment, and was a distinct expression of opinion by the Judge who was then the head of this Court, that the *Wills Act* had made no alteration in the law in this respect. Therefore, both on principle and authority, I feel bound to come to a different conclusion from the Vice-Chancellor in this case, and his decree must be altered accordingly." And Lord Justice *James*, after stating that he was of the same opinion, said: "I well recollect the decision of Lord *Chelmsford* in *Hensman* v. *Fryer*, and the extent to which it was canvassed at the time, and I was never able to see what answer could be made to the principle on which he based his judgment. . . . . I think that the decision of Lord *Chelmsford* is binding upon the other branches of the Court. It was a decision deliberately pronounced for the purpose of settling the differences which existed between the various branches of the Court, and I think it ought to have been treated as settling the question." But subsequently to the decision in *Lancefield* v. *Iggulden*, the case of *Tomkins* v. *Colthurst* (6) had come before Vice-Chancellor *Malins*. The question there was, whether there was a liability between pecuniary legatees, specific legatees, and specific devisees, to contribute rateably to make up a deficiency of the personal

(1) Law Rep. 14 Eq. 234.
(2) Ibid. 3 Ch. 420.
(3) 2 Coll. 490–502.
(4) Law Rep. 17 Eq. 556.
(5) Ibid. 10 Ch. 136, 141.
(6) 1 Ch. D. 626.

estate to pay the debts and funeral and testamentary expenses of the testator, and Vice-Chancellor *Malins* in his judgment said (1): "But the other point" (that of marshalling in case of deficiency of personal estate to pay debts) "decided in *Hensman* v. *Fryer* (2), was a reversal of the settled rule of the Court. . . . . In *Collins* v. *Lewis* (3) the same point came before Sir *John Stuart*, who, as Vice-Chancellor, had greater experience of the mode of administering estates in Chancery than Lord *Chelmsford*. The Chancery Bar, as well as the Judges and other persons familiar with the practice of that Court, know the rule perfectly well, and if Lord *Chelmsford* had been as firmly impressed with that view, he would not, I think, have come to the conclusion to which he did come." And, after referring to the decision in *Lancefield* v. *Iggulden* (4), the Vice-Chancellor added: "I cannot think that the learned Judges, by expressions in that case which directly refer only to points which did arise, intended to adopt a rule which would reverse the old and well-settled practice of the Court of Chancery, upon an entirely distinct point. I must therefore continue to follow the old rule as to the marshalling of assets." And he still refused to follow the decision in *Hensman* v. *Fryer*. But it is submitted that it ought to be followed in this case, and the judgments in the other cases disregarded, particularly as in the case of *Jackson* v. *Pease* (5), where there was insufficient personalty to pay the costs of an administration suit, the decision in *Hensman* v. *Fryer* was in effect followed by this branch of the Court.

Hinde Palmer, Q.C., and *Cecil Russell*, for the Defendants, were not called upon.

HALL, V.C.:—

I am of opinion that it must be considered settled that pecuniary legacies must be resorted to before real estate for payment of the debts of the testator.

The decisions of Vice-Chancellor *Stuart* in *Collins* v. *Lewis*, and Vice-Chancellor *Malins* in *Dugdale* v. *Dugdale* (6) and *Tomkins* v. *Colthurst*, are in accordance with the decision of Lord *Cottenham*

(1) 1 Ch. D. 628, 629.
(2) Law Rep. 3 Ch. 420.
(3) Ibid. 8 Eq. 708.
(4) Law Rep. 10 Ch. 136.
(5) Ibid. 19 Eq. 96.
(6) Ibid. 14 Eq. 234.

V.-C. H. 1876 FARQUHARSON v. FLOYER.

in *Mirehouse* v. *Scaife* (1), and I shall follow them. I do not consider that in so doing I am acting in opposition to the authority of the Court of Appeal in *Lancefield* v. *Iggulden*.

Solicitors: *Lawford & Waterhouse; E. M. Hore.*

V.-C. H. 1876 *May* 19.

In re VICKERS' TRUSTS.

Practice—New Trustees—Lunatic—Chancery.

A petition under the *Trustee Acts*, 1850 and 1852, for the appointment of new trustees in the place of trustees, two of whom were dead, and one of the surviving two was a person of unsound mind but not so found by inquisition (not asking for a vesting order), may be presented in Chancery and not in Lunacy.

Statement. *JOHN VICKERS*, by his will, dated in 1822, devised real estate to four trustees, of whom two had died, and one of the survivors was of unsound mind but not so found by inquisition. The will contained a power to appoint new trustees exerciseable by the survivors. This was a petition by the beneficiaries and surviving trustees asking for the appointment of three new trustees.

Argument. *Dunning*, for the Petitioners, submitted that such petitions were rightly presented "In Chancery," as the jurisdiction to appoint trustees was in Chancery, though the jurisdiction to divest the legal estate of a lunatic was "In Lunacy." In this case a vesting order was not required. The legal estate was outstanding, and would be got in by conveyance. He referred to the *Trustee Act*, 1850, ss. 3, 32; the *Trustee Extension Act*, 1852, s. 10; *In re Boyce* (2), *In re Owen* (3), *In re Sparrow* (4), *In re East* (5), *In re Green* (6), *In re Mason* (7), and *In re Jones* (8).

Judgment. HALL, V.C., made the order asked for.

Solicitor: *J. W. Hickin*, agent for *Vickers & Son, Sheffield.*

(1) 2 My. & Cr. 695.
(2) 4 D. J. & S. 205. 10 Jur. N.S. 138
(3) Law Rep. 4 Ch. 782.
(4) Ibid. 5 Ch. 662.
(5) Law Rep. 8 Ch. 735.
(6) Ibid. 10 Ch. 272.
(7) Ibid. 273.
(8) 2 Ch. D. 70.

In re LEWIS. *Ex parte* MAUTHNER.

C. J. B.

1876

April 10; *May* 1.

Composition—Execution Creditor—Injunction—Notice of Motion—Service by Post—Bankruptcy Rules, 1870, *rr.* 14, 50, 51, 52.

Notice of an application to continue an interim injunction may be properly served by post under rule 14 of the Bankruptcy Rules, 1870.

Re Verner (1) overruled.

On the filing of a liquidation petition an injunction was at once granted *ex parte*, restraining a creditor from proceeding further in an action in which he had recovered judgment against the debtor. The next day the creditor delivered a writ of *fi. fa.* to the sheriff. He did not deny that, before he did so, he knew of the restraining order. The creditors resolved upon a composition:—

Held, that the judgment creditor was not entitled, after the registration of the resolution, to enforce his execution against the debtor.

Ex parte Jones (2) distinguished.

Statement.

THIS was an appeal from a decision of the Judge of the *Newcastle-on-Tyne* County Court.

On the 23rd of October, 1875, *Max Mauthner* and others, wholesale jewellers in *London*, who traded under the firm of *Goldschmidt & Sons*, commenced an action in the Court of Queen's Bench against *Abraham Lewis*, a jeweller at *Newcastle-on-Tyne*, to recover the sum of £43 3*s.*, the price of goods supplied by them to him. The action was tried on the 26th of January, 1876, when a verdict was found for the Plaintiffs, and judgment was directed to be entered for them with costs. Judgment was signed on the 4th of February for £43 3*s.* and £46 14*s.* costs, and the same day a writ of *fi. fa.* was lodged with the *London* agent for the sheriff of *Newcastle-on-Tyne*. On the 3rd of February, *Lewis* had filed a liquidation petition in the County Court at *Newcastle-on-Tyne*, and the same day *ex parte* orders were made by that Court, appointing a receiver of the debtor's property, and restraining *Goldschmidt & Sons* from taking any further proceedings in the action until the 23rd of February. The 22nd of February had been fixed for the first meeting of the creditors under the petition. *Goldschmidt & Sons* admitted that they received a copy of the restraining order of the 3rd of February by post. On the 22nd of February the creditors resolved to accept a composition of 1*s.* 6*d.* in the pound.

(1) 15 Sol. J. 697. (2) Law Rep. 10 Ch. 663.

C. J. B. 1876 *In re* LEWIS. *Ex parte* MAUTHNER.

Goldschmidt & Sons were represented by a proxy at this meeting. On the 23rd of February an order was made continuing the interim injunction till the 4th of March. A copy of a notice of motion for an order to make the interim injunction absolute had been sent to *Goldschmidt & Sons* by post, but they said that they did not receive it. They admitted, however, that they received by post a copy of the order of the 23rd of February, after it had been made. The injunction was continued to the 4th of March, instead of being made absolute at once, because the second meeting of the creditors had not then been held. On the 3rd of March the second meeting was held, and the resolution accepting the composition was confirmed. It was afterwards duly registered. On the 4th of March the interim injunction was again continued to the 10th of March, and on the 10th of March the injunction was made perpetual. *Goldschmidt & Sons* admitted that this order was served on them, but they said that they never received any notice of the intention to apply for it. They appealed from the order of the 10th of March.

Statement.

Argument.

Robertson Griffiths, for the Appellants:—

After the composition resolution had been registered we were entitled to proceed with our execution against the debtor: *Ex parte Jones* (1). The writ bound the goods as against the debtor from the time of its being delivered to the sheriff. At any rate, the service by post of the notice of motion to continue the *ex parte* injunction was insufficient. This was expressly decided by Mr. Registrar *Murray*, acting as Chief Judge, in *Re Verner* (2).

Bagley, for the debtor, was not called on.

Judgment.

BACON, C.J.:—

The case seems to me a perfectly clear one. The Appellants complain that they had no notice of the intention to apply for the injunction. There was no need to give them notice in the first instance. The order of the 3rd of February was made quite regularly. A copy of it was sent to the Appellants, and they admit that they received it. I must take it to be proved, indeed it is not denied, that before they delivered their writ to the sheriff they had notice of the restraining order. If that is so, there is an

(1) Law Rep. 10 Ch. 663. (2) 15 Sol. J. 697.

C. J. B.
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Judgment.

end of the case. It is immaterial whether they had notice of the intention to apply for the extension of the injunction. If they rely on *Ex parte Jones* (1) (which, in my opinion, is not in their favour), still they do not say that they had not notice of the injunction before they delivered their writ. They rely on a supposed technical defect in the subsequent proceedings. If that were material, I cannot see that there was any such defect. I think that service by post was the regular and proper legal service of a notice of motion to continue the injunction. I am of opinion that the order appealed from is a perfectly right one. No ground, either technical or formal, in reason or justice, has been shewn for discharging it. The Appellants, though they have had ample opportunity of shewing that they had not notice of the injunction before they delivered their writ, have not done so. The appeal must be dismissed with costs.

Solicitors for Appellants: *Webster & Graham.*

Solicitors for Debtor: *Pyke, Irving, & Pyke,* agents for *J. G. & J. E. Joel, Newcastle-on-Tyne.*

In re PRAGER. *Ex parte* SOCIÉTÉ COCKRILL.

C. J. B.
1876
May 22.

Liquidation—Release of Trustee by Creditors—Non-payment of Dividend to Creditor—Jurisdiction of Court of Bankruptcy—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 46, 125.

The trustee of a liquidating debtor sold the whole estate for a sum equal to 7*s.* 6*d.* in the pound upon the amount of the proveable debts, to be paid in three instalments, on the 23rd of April, the 23rd of June, and the 23rd of August. On the 23rd of April the creditors resolved that the debtor should have his discharge as from the 30th of April, subject to a certificate by the trustee that the first instalment of the purchase-money had been paid, and that promissory notes for the other instalments had been delivered to him, and that the close of the liquidation should take place, and the trustee be released on and from the 23rd of October:—

Held (reversing the decision of the County Court Judge), that, notwithstanding the release of the trustee, the Court had jurisdiction to order him to pay a dividend to a creditor.

Statement.

THIS was an appeal from a decision of the Judge of the *Sheffield* County Court.

(1) Law Rep. 10 Ch. 663.

C. J. B.
1876
In re PRAGER.
Ex parte SOCIÉTÉ COCKRILL.
Statement.

On the 7th of January, 1874, *Henry Prager*, a steel and railway spring manufacturer at *Sheffield*, filed a liquidation petition. On the 11th of March, 1874, the creditors, at their first meeting, resolved on a liquidation by arrangement, appointed *J. U. Wing* trustee, and appointed a committee of inspection. They also resolved that the trustee, with the consent of the committee of inspection, should be at liberty to sell the whole or any part of the estate in such manner and upon such terms as he might, with such sanction as aforesaid, think most advisable.

On the 9th of April, 1874, an agreement was entered into between *Wing* of the first part, *Prager* of the second part, and *F. E. Leggoe* of the third part, by which *Wing* agreed to sell to *Leggoe*, and *Leggoe* agreed to purchase, the whole of the estate of *Prager* for a sum equal to 7*s.* 6*d.* in the pound upon the amount of the unsecured debts proveable and proved during the liquidation against the estate of *Prager*, to be paid by instalments, viz., 2*s.* 6*d.* on the 23rd of April, 2*s.* 6*d.* on the 23rd of June, and 2*s.* 6*d.* on the 23rd of August, 1874, the first instalment cash, the balance in promissory notes signed by *Prager* and *Leggoe*.

On the 23rd of April, 1874, a general meeting of the creditors was held, when it was resolved that the discharge of *Prager* should be granted as and from the 30th of April, 1874, subject to a certificate by the trustee that cash for 2*s.* 6*d.* in the pound had been paid, and promissory notes for the other two sums of 2*s.* 6*d.* in the pound, signed by the debtor and *Leggoe*, had been handed to the trustee; that the close of the liquidation should take place, and that the trustee should be released on and from the 23rd of October, 1874. On the 12th of May, 1874, the trustee gave his certificate that the cash and promissory notes for the three instalments of the purchase-money had been respectively paid and delivered to him.

Among the creditors of *Prager* was a company called the *Société John Cockrill*, of *Seraing*, in *Belgium*. At the first meeting they proved a debt of £1131 11*s.* 8*d.* for goods sold and delivered. The *Société* were not represented at the meeting of the 23rd of April, and had no notice of it. At the time when the petition was filed some other goods which *Prager* had ordered of the *Société* were in transit to him, and the *Société* stopped these goods

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in transitu in a warehouse at *Hull*. On the 3rd of June, 1874, they withdrew their notice stopping the goods, which were then given up to *Leggoe*. On the 26th of May, 1875, the *Société* tendered a proof for £901 8*s*. 3*d*. in respect of these goods. They applied to the trustee for payment of 7*s*. 6*d*. in the pound on both the proofs. The trustee, at the instance of *Leggoe*, resisted payment, on the ground that he was entitled to damages to a larger amount by reason of the detention by the *Société* of the goods which they had stopped *in transitu*. The *Société* applied to the County Court for an order that the trustee should pay them the dividend. The Judge refused the application, on the ground that, the trustee having been released by the resolution of the 23rd of April, 1874, the Court had no jurisdiction in the matter. The *Société* appealed.

Argument.

Winslow, Q.C., and *Bagley*, for the Appellants:—

The trustee, by his certificate, has admitted that he has received the money to pay us our dividend. We cannot sue him for it: *Bankruptcy Act*, 1869, s. 46; and if this Court has no jurisdiction over him, we shall be without any remedy.

[They were stopped.]

De Gex, Q.C., and *C. Gould*, for the trustee:—

The intention of the arrangement was that the purchaser of the estate should pay the instalments to the creditors, and on this footing the creditors released the trustee.

[BACON, C.J.:—He cannot be released until he has discharged his duty.]

So long as the Appellants detained wrongfully a part of the debtor's estate they were not entitled to receive any dividend: *Ex parte Dobson* (1); *Ex parte Grimwood* (2); *Ex parte Ackroyd* (3). The detention of the goods which were stopped *in transitu* has caused an amount of damage to the estate exceeding the dividend on the Appellants' debts. If the Court has jurisdiction in the matter, then the amount of this damage should be ascertained,

(1) 1 Mont. & A. 666. (2) 3 Mont. & A. 285, 290.
(3) 1 Gly. & J. 391.

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and set off against the dividend. The second proof had not been made at the time when the release of the trustee was granted.

BACON, C.J.:—

The trustee was released upon the terms of a dividend of 7*s.* 6*d.* in the pound being paid in respect of all the debts proveable against the estate. The Appellants have a right to be paid the dividend on both the debts which they have proved. But I think, Mr. *Winslow*, the trustee must be allowed to set up any claim which he may have by way of set-off.

Winslow, Q.C.:—The claim to stop the goods was withdrawn in June, 1874. The trustee must have known then that the Appellants would claim to prove for the £901.

BACON, C.J.:—

The trustee must be allowed to set up his claim for damages at his own risk. Subject to that, the Appellants are entitled to be paid their dividends. The arrangement between the trustee and *Leggoe* cannot affect the Appellants' rights or the duties which the trustee has to perform. I must discharge the order of the County Court, and the Appellants must have their costs of the application. The trustee may, at his own risk, have an inquiry whether he is entitled to set off against the dividends any and what sum by way of damages in respect of the stoppage of the goods.

Solicitor for Appellants: *T. G. Brewer.*

Solicitors for Trustee: *Torr & Co.*, agents for *Burdekin & Co.*, *Sheffield.*

In re MEADE. *Ex parte* HAROLD.

C. J. B.
1876
May 22.

Resolutions in form for Liquidation, but in substance for Composition—Action by Creditor not included in Debtor's Statement—Injunction—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 126—*Bankruptcy Rules*, 1870, *r.* 289.

The creditors of a debtor who had filed a liquidation petition resolved that his affairs should be liquidated by arrangement, and appointed a trustee; that, on payment by the debtor to the trustee of a sum equal to 1*s.* in the pound on the amount of the debts, he should be entitled to have his discharge; and that the payment should be made by three instalments of 4*d.* in the pound, at six, twelve, and eighteen months from the registration of the resolutions. No second meeting was summoned to confirm these resolutions, but they were registered:—

Held, that the arrangement was, in substance, a composition; that it amounted to an evasion of the provisions of sect. 126 of the *Bankruptcy Act*, 1869, and that the resolutions ought not to have been registered.

After the registration a creditor, who was not included in the debtor's statement of affairs, and who had no notice of the proceedings, brought an action against the debtor for money had and received, and also in detinue:—

Held, that, so far as the action was founded on the count in detinue, it was an action in tort, and that the Court had no power to restrain it, and that in other respects the Court, in the exercise of the discretion given by rule 289 of the Bankruptcy Rules, 1870, ought not to restrain the action.

Statement.

THIS was an appeal from a decision of the Registrar of the *Manchester* County Court, acting as Judge.

In February, 1873, *J. F. W. Harold*, an artist residing at *Southampton*, employed *H. D. Meade*, a financial and insurance agent at *Manchester*, to superintend the sale of some pictures for him. He sent the pictures to *Meade* at *Manchester*, requesting him to have them sold by auction by Messrs. *Capes & Dunn*, auctioneers at *Manchester*. *Meade* accordingly made the necessary arrangements with *Capes & Dunn*, and they succeeded in selling some of the pictures at various sales held by them in the course of 1873. Early in April, 1874, they paid over to *Meade* £25 2*s.* 6*d.*, the proceeds of the sales, telling him at the same time that the remainder of the pictures were still in their hands, they not being able to find a purchaser for them. *Meade* then sent *Harold* the accounts which he had received from *Capes & Dunn*, and remitted him £10 on account. On the 8th of April, 1874, *Meade* filed a liquidation

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petition, and on the 23rd of April his creditors at their first meeting passed the following resolutions:

(1.) That the affairs of *Meade* should be liquidated by arrangement and not in bankruptcy.

(2.) That *W. F. Bewley* should be appointed trustee.

(3.) That on payment by *Meade* to the trustee of a sum equal to 1*s.* in the pound on the respective amounts of the debts due to the several creditors, *Meade* should be entitled to have, and was thereby granted, his discharge.

(4.) That such payment should be made by *Meade*, by three equal instalments each of 4*d.* in the pound, at six, twelve, and eighteen months from the day of the date of the registration of the resolutions, and that such instalments should be secured by the promissory notes of the debtor at such respective dates.

No second meeting was held to confirm the resolutions, but they were registered.

Harold was not inserted in the debtor's list of creditors, and he had no notice of the proceedings, and no knowledge of them until April, 1875. On the 25th of March, 1875, his solicitors wrote to *Meade*, asking for particulars of the prices realized on the sale of the pictures which had been sold after the 7th of March, 1873, and for the return of those which remained unsold. On the 25th of April, 1875, *Meade's* solicitor answered this letter, sending an account of moneys received by *Meade*, amounting to £25 2*s.* 6*d.*, and stating that the unsold pictures were still in the hands of the representatives of the auctioneers, who were dead, and that every effort had been made to obtain them. He added, that *Meade* had filed a liquidation petition, and had obtained his discharge. Shortly afterwards *Harold* commenced an action in the Court of Exchequer for money had and received, and for damages for the wrongful detention of the pictures which remained unsold. *Meade* delivered various pleas to the declaration, but he did not plead the resolutions under the liquidation petition. The action came on to be tried on the 24th of June, 1875, and was then undefended. A verdict was found for the Plaintiff for £15, the balance of the £25 received by *Meade*, and £25 damages for the detention of the unsold pictures. On the 24th of June, *Meade* obtained in the County Court an *ex parte* order restraining *Harold*, until the 8th of July, from taking any

further proceedings in the action. The injunction was continued by subsequent orders, and ultimately, on the 22nd of July, it was made absolute.

Harold appealed.

Horne Payne, for the Appellant:—

The action, so far as it was founded on the count in detinue, was an action in tort, and to that extent the order is clearly wrong in restraining the proceedings: *Ex parte Baum* (1). The resolutions were invalid, for though they are in form for a liquidation by arrangement, in substance the arrangement amounts to a composition, and the resolutions required the confirmation of a second meeting of the creditors. *Harold*, not having been included in the debtor's statement of affairs, is not bound by the resolutions: *Bankruptcy Act*, 1869, s. 126. *Ex parte Pooley* (2), which may be relied on by the other side, was a different case. There the effect of the creditor's resolutions was to release the debtor's after-acquired property on certain conditions. The creditors had power to do that at one meeting. In the present case the debtor's existing estate was not given up to the creditors, and the resolutions were an evasion of the provisions of sect. 126: *Ex parte Lovering, In re Moss* (Feb. 16, 1872), *Roche* and *Hazlitt's* Bankruptcy (3). In that case a trustee was appointed, and he was authorized to sell the estate for a sum which would give the creditors 7*s.* 6*d.* in the pound. The Lords Justices held that that was a colourable evasion of sects. 125 and 126, and that registration had been rightly refused. At any rate, the Court has, under rule 289 of the Bankruptcy Rules, 1870, a discretion as to restraining the proceedings (4): *Ex parte Mills* (5).

(1) Law Rep. 9 Ch. 673.
(2) Ibid. 5 Ch. 722.
(3) 2nd Ed. p. 433.
(4) Rule 289: "Every creditor in respect of a proveable debt shall, in the event of a liquidation by arrangement being resolved upon, be absolutely restrained from commencing or continuing or enforcing any proceedings whatsoever against the debtor or his property, notwithstanding that such creditor has not received notice of the general meeting, unless the Court shall be of opinion that such creditor's rights have been prejudicially affected by the resolution, and that the estate would yield a larger dividend if administered in bankruptcy."
(5) Law Rep. 6 Ch. 594.

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Finlay Knight, for the debtor:—

The resolutions merely prescribe the terms on which the debtor shall be entitled to his discharge. *Ex parte Pooley* (1) shews that the creditors had power to do this at one meeting. This being so, the injunction was properly granted under rule 289. An action in detinue is not strictly an action in tort. Sect. 31 gives a right of proof in such a case. There was no deceit or wrong, as there was in *Ex parte Baum* (2).

Judgment.

BACON, C.J.:—

In my opinion these resolutions ought not to have been registered at all. They are like those which were passed in *Ex parte Lovering*, and which the Lords Justices held to be an evasion of the provisions of the Act. In *Ex parte Pooley* the resolutions were quite different; they only released the debtor's future estate upon condition of the payment of a sum of money which was to be provided from another source. The resolutions in the present case were a mere evasion of the provisions of the statute. Then this action was brought in detinue and for money had and received. If the debtor had chosen to plead the resolutions the whole matter might have been decided then. So far as the action is founded on tort the Court has no power to restrain it; the debtor might have discharged himself by restoring the articles which he had detained. Then there arises the question how I ought to exercise the discretion given to me by rule 289. I think that the Appellant's rights have been prejudicially affected by the resolutions, inasmuch as the estate was left in the possession of the debtor, and the Appellant was obliged to bring his action. He ought not, therefore, to be restrained from proceeding with the action, and if ever there was a case in which an Appellant ought to have his costs of an appeal, this is one.

Solicitor for Appellant: *Walter Webb*, agent for *W. & H. G. Best, Southampton.*

Solicitors for Debtor: *Tamplin, Tayler, & Joseph*, agents for *J. Best, Manchester.*

(1) Law Rep. 5 Ch. 722. (2) Law Rep. 9 Ch. 673.

In re REED. *Ex parte* BARNETT.

C. J. B. 1876 May 22.

Liquidation—Undischarged Debtor—After-acquired Property—Goods sent by Mistake—Duty of Trustee—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 15.

A liquidating debtor who had not obtained his discharge engaged in trade. He ordered some goods from a wholesale house, who sent the goods to him in the belief that the order had come from a firm with whom they were acquainted, and whose name resembled that under which the debtor traded. The trustee claimed the goods:—

Held (reversing the decision of the County Court Judge), that the debtor had acquired no property in the goods, and that the trustee was bound to return them to the persons who sent them.

Statement.

THIS was an appeal from a decision of the Judge of the *East Stonehouse* County Court.

G. P. Reed formerly carried on the business of a wine merchant in partnership with his father and brothers at *Mincing Lane, Compton Giffard*, near *Plymouth*, under the firm of *Joseph Reed & Sons*. On the death of the father *G. P. Reed* continued the business under the old firm, while his brothers carried on a similar business in *Old Town Street, Plymouth*, under the firm of *Reed Brothers & Co.* On the 30th of July, 1875, *G. P. Reed* filed a liquidation petition, under which his creditors resolved on a liquidation by arrangement, and appointed *Edward Duncan* trustee. After this the debtor removed from *Compton Giffard* into *Love Lane, Plymouth*, where he commenced carrying on again the business of a wine merchant under the old firm of *Joseph Reed & Sons*. He attempted to alter the name of the street, without the consent of the local authorities, into "*Mincing Lane, Plymouth.*" In letters written by him he gave his address as *Mincing Lane, Plymouth*. On the 17th of February, 1876, he sent by post *to* Messrs. *John Barnett & Son*, wholesale wine merchants in *Mark Lane, London*, a letter as follows:—

"*Mincing Lane, Plymouth.*
"17th February, 1876.

"Messrs. *John Barnett & Son.*

"Gentlemen,—Please clear and forward per G. W. Rail 1 hhd. O sherry, £17, and 1 hhd. XX, £24, and oblige,

"Yours truly,
"*Joseph Reed & Sons.*"

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Statement.

Barnett & Sons had had no previous dealings with *Joseph Reed & Sons*, but they executed the order, believing that it was sent by *Reed Brothers & Co.*, with whom they had transacted business. On sending the invoice to *Reed Brothers & Co.*, and pressing them for payment of the sum which they had advanced to pay the Government duty, *Barnett & Son* discovered the mistake which they had made, *Reed Brothers & Co.* disclaiming any knowledge of the transaction. On the 25th of February *G. P. Reed's* trustee took possession of the two casks of sherry, the debtor not having obtained his discharge. On the 22nd of March *Barnett & Son* gave notice of motion for an order that the trustee should deliver up the two casks to them. The Judge refused the application. *Barnett & Son* appealed.

Argument.

Finlay Knight, for the Appellants :—

The sherry was clearly sent by *Barnett & Son* to the debtor by mistake. It never became the debtor's property, and it was the duty of the trustee to deliver it up to *Barnett & Son : Ex parte James* (1); *Boulton* v. *Jones* (2); *Benjamin* on Sales (3). We applied to the Court as soon as possible after discovering the mistake.

R. A. McCall, for the trustee :—

The names and addresses of the two firms were different, and, though the Appellants may have thought that they were dealing with *Reed Brothers & Co.*, still it is clear that they intended to deal with the firm who sent them the order. The remarks of *Blackburn*, J., in the recent case of *Lindsay* v. *Cundy* (4), shew that *Hardman* v. *Booth* (5) would not be followed now. In *Lindsay* v. *Cundy* the jury found that there had been fraud ; there is no evidence of fraud here.

Judgment.

BACON, C.J. :—

With regard to the probability of the case, no one, I think, can doubt for a moment. The affidavit of the Appellants is uncontradicted, and the probability which arises from the very nature of

(1) Law Rep. 9 Ch. 609.
(2) 2 H. & N. 564.
(3) 2nd Ed. p. 324.
(4) 1 Q. B. D. 348.
(5) 1 H. & C. 308.

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the case is in their favour. The probability that they intended to intrust these two casks of sherry to an undischarged liquidating debtor is too violent for me to entertain it. The casks got into the possession of a person to whom they did not intend to send them, and his trustee claims to keep them without paying for them. The trustee, no doubt, is entitled to any property which is acquired by the debtor during the continuance of the liquidation, but in my opinion the debtor never acquired any property in these goods. If the law enabled the trustee to keep possession of them, it would be a very iniquitous law. The trustee has no right to these goods, but is bound to return them to the true owners, unless, indeed, he is willing to pay the price of them. He ought not to have resisted the claim of the Appellants; it was simple dishonesty to do so. The case of *Lindsay* v. *Cundy* has no sort of application, for there the Defendant was a *bonâ fide* purchaser of the goods from the person to whom they had been sent by mistake.

Solicitors for Appellants: *Hillearys*, agents for *Beer & Rundle, Devonport.*

Solicitors for Trustee: *Lanfear & Stewart*, agents for *John Shelly, Plymouth.*

In re ACKARY. *Ex parte* BOLLAND.

C. J. B. 1876 *May* 29.

*Liquidation—Dispute between Trustee and Third Party—Reference to Arbitration by Consent—Witness refusing to attend before Arbitrator—Power of Court to issue Subpœna—*3 & 4 *Will.* 4, *c.* 42, *s.* 40—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 66—*Bankruptcy Rules*, 1870, *r.* 166—9 & 10 *Vict. c.* 95, *ss.* 77, 85.

A matter in dispute between a trustee in a liquidation and a third party was, by an order made by consent, referred to arbitration. A witness refused to attend before the arbitrator:—

Held (reversing the decision of the County Court Judge), that the Court could issue a subpœna, under rule 166 of the Bankruptcy Rules, 1870, for the attendance of the witness before the arbitrator.

Statement.

THIS was an appeal from a decision of one of the Judges of the *Liverpool* County Court.

J. G. Ackary, a joiner at *St. Helen's*, filed a liquidation petition,

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Statement.

under which *Henry Bolland* was appointed trustee. In the course of the proceedings the trustee raised a claim for a sum of £300 against one *Joseph Greenough*. On the 9th of October, 1874, an order was made by the County Court, with the consent of the trustee and *Greenough*, referring all the matters in difference between them to the award of *David Gibson*, an accountant in *Liverpool*, whose award was to be final and conclusive on both the parties. On the 11th of May, 1876, the trustee applied to the Court to issue subpœnas, under rule 166 of the Bankruptcy Rules, 1870, for the attendance before the arbitrator of two witnesses whose evidence was material for the decision of the questions in dispute, and who had refused to attend. The Judge was of opinion that he had no power to make the order, and refused the application. The trustee appealed.

Argument.

Channell, for the trustee:—

A Court of Common Law could have issued a subpœna in such a case: 3 & 4 Will. 4, c. 42, s. 40; and the Court of Chancery had the same power: *In re Warner and Powell's Arbitration* (1); *Re Ricketts* (2). The County Courts, in their bankruptcy jurisdiction, have all the powers of the Court of Chancery; *Bankruptcy Act*, 1869, s. 66. Indeed, the County Court could have issued the subpœna in its common law jurisdiction: 9 & 10 Vict. c. 95, ss. 77, 85.

Judgment.

BACON, C.J., held that the County Court had power to issue the subpœnas.

Solicitor for Trustee: *E. W. Owles*, agent for *Barrell & Rodway*, *Liverpool*.

(1) Law Rep. 3 Eq. 261. (2) 3 N R. 56.

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[1875 S. 185.]

BIRMINGHAM SYNDICATE *v.* SWINDELL.

[1875 B. 285.]

C. A.
1876
V.-C. H.
May 27.

C. A.
July 8.

Practice—Time for Appealing—Refusal of Interlocutory Motion—Order as to Costs—Trial before Judge and Jury—Action in Chancery Division—Discretion of Judge—Rules of Court, 1875, *Order* LVIII., *r.* 15; *Order* XXXVI., *rr.* 3, 4, 26.

When an interlocutory motion is refused, and the Court at the same time makes an order as to the costs of the motion, this addition does not enlarge the time for appealing, which still begins to run from the time of the refusal of the order, and not from the time of its being perfected by entry.

In actions which before the coming into operation of the Judicature Acts could only have been brought as suits in the Court of Chancery, the High Court has now the same discretion as the Court of Chancery formerly had, whether there shall be a trial by jury. The parties have in such cases no absolute right to a trial by jury.

Statement.

THE bill in the first of these suits was filed on the 23rd of July, 1875, for the specific performance of an agreement, dated the 26th of May, 1874, for the sale by the Plaintiffs to the Defendants of a colliery called the *Homer Hill Colliery*.

The bill in the second suit was filed on the 27th of August, 1875, and it prayed a declaration that the agreement of the 26th of May, 1874, had been obtained by misrepresentation on the part of the Plaintiffs in the first suit, and was fraudulent and void, and that it might be rescinded. To this suit a company called the *Homer Hill Colliery Company, Limited*, and one of their directors, were also Defendants, they having entered into a sub-contract with the Syndicate for the purchase of the colliery.

The answer in the first suit was filed on the 6th of November, 1875. The Plaintiffs delivered their reply on the 13th of April, 1876, by which they joined issue on the defence, and on the 28th of April they gave the following notice of trial:—"Take notice of trial of this action for the 8th May next." On the 2nd of May the Defendants, in pursuance of Order XXXVI., rule 3, gave notice

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of their desire that the questions of fact in the first suit should be tried before a Judge and jury.

Statement.

The answers in the second suit were filed on the 11th of February, the 13th of March, and the 11th of April, 1876. In the second suit the Plaintiffs delivered their reply on the 13th of April, 1876, by which they joined issue on the answers, and on the 9th of May they gave notice of trial of the second suit on the 17th of May before a Judge and jury. On the 10th of May they took out a summons asking that issues of fact in the two causes might be tried before a Judge and jury, and that the costs of the application might be costs in both the causes. The hearing of the summons was adjourned into Court, and it came on for argument on the 27th of May before Vice-Chancellor *Hall*.

Argument.

Bristowe, Q.C., and *W. P. Beale*, in support of the summons:—

It was understood from the case of *Clarke* v. *Cookson* (1) that your Lordship, after considering the matter with the Master of the Rolls and the Vice-Chancellor *Malins*, held that this branch of the Court could not have a trial before it with a jury.

[HALL, V.C., said that the Vice-Chancellor *Bacon* took the same view.]

The Syndicate had accordingly given notices so as to bring themselves strictly within the exact terms of rule 3, which did not appear to have been done in that case. They had also framed issues of fact, one of which was whether the Syndicate were induced by misrepresentations and concealment of fact to enter into the agreement, and another was whether by any laches on their part they had acquiesced in the agreement notwithstanding the misrepresentation and concealment. It was eminently a case for a trial by jury, and the issues which had been framed might either be settled now or referred to Chambers.

If the application now made were granted, there would be no further expense until the jury trial. If it were refused, there would be the expense of bringing the actions to a trial here, and after they had been opened there would still be the necessity of trying the issues of fact by a jury.

(1) 2 Ch. D. 746.

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Argument.

[HALL, V.C., said that there were preliminary questions of conduct to be tried, the determination of which might preclude the Defendants from raising any issues at all, or setting up the misrepresentations as a defence to the specific performance suit.]

We submit that under rule 3 the Plaintiff, who is *dominus litis* in his own case, has the right to decide whether it shall be tried before a Judge and jury or not; and in like manner the Defendant, upon giving certain notices, has a right to have issues of fact so tried, and in both these actions the issues of fact are substantially the same.

It was the intention of the Legislature that both the Plaintiff and the Defendant should have, in the manner pointed out in the rule, the right to select the tribunal. The rules should receive a liberal construction, and the words "be entitled," in the latter part of rule 3, make a jury trial the right of persons seeking a trial of questions of fact. If there is an order to try the questions of fact before a Judge and jury, the ordinary venue would be at *Stafford;* the witnesses would not have to be brought up to *London*, and the jury might view the premises. We have as much right to have the case tried before a jury as if the actions had been brought in a Common Law Division. The same point was raised in *Sugg* v. *Silber* (1), where, though it was admitted that the case could be better heard before the Judge himself, it was held by the Queen's Bench Division that the Defendant could not be deprived of his option to give notice under rule 3 requiring a trial by jury.

Russell Roberts, for the *Homer Hill Colliery Company*, supported the same contention. The Court could not consider that there were any preliminary questions to be tried, for none such had been raised in the recognised manner by plea or demurrer. The issues of fact ought to be tried first, and the Court would deal with the questions of law afterwards. The whole tenor of the *Judicature Act* and the Rules proceeded upon that basis, and prescribed the trial of issues of fact first, and after that trial motion for judgment; and, moreover, rule 6 of Order XXXVI. provided that a Judge might in any action, at any time, order different questions of fact to be

(1) 1 Q. B. D. 362.

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Argument.

tried by different modes of trial, or that one or more questions or issues of fact might be tried before the others.

Dickinson, Q.C., and *Ingle Joyce*, for the Plaintiffs in the first action:—

We are ready to bring on our action in the ordinary way, and do not desire a jury. There are mixed questions of law and fact in both actions, which can only be properly tried by a Judge of this Division. *Sugg* v. *Silber* (1) was an action brought under the old system, in which the trial was, of course, by jury, unless there was the exceptional trial before an assessor, of which the Plaintiff had given notice.

[They were stopped by the Court.]

Judgment, V.-C. H.

HALL, V.C.:—

I do not mean to direct issues to be tried in this case, at this stage at all events. It seems to me, from the explanation which has been given, and from the form of the issues themselves, particularly the issue as regards laches, that this case, being one for specific performance on the one hand, and on the other hand for rescission of the contract, is specially and peculiarly a case to be dealt with in this Division of the Court. It appears to me that the whole case may possibly resolve itself into a question as to what is, under all the circumstances, the effect of the conduct of the parties in reference to this colliery subsequent to the contract; and it may be that if I were to direct these issues, it would turn out that all the money which would be spent in trying them would be thrown away. It is clear that I have the power, under the 26th rule of Order XXXVI., in a proper case, to try the question myself without a jury; and I may say I do not dispute the contention of Mr. *Bristowe* that ordinarily it is the right of the Defendant to have the trial take place before a jury. But the right is subject to this—that the Judge may exercise his discretion under the 26th rule of Order XXXVI. to direct a trial without a jury. I do not at present exercise that discretion so as permanently to say, once for all, that this trial is to go through each and every branch of it before this Court; but the case must be

(1) 1 Q. B. D. 362.

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opened on each side. I reserve to myself the right to send any issues of fact to a jury after the case is thoroughly understood by me, so as to enable me to judge whether that is a proper course to adopt, not forgetting that ordinarily, upon mere questions of fact, the party would have a right to go to a jury. I shall bear that in mind. At the same time the case may have been so gone into that I shall think it right—which I certainly have power to do—not even to direct issues. That is a matter for further consideration at the proper time. At present I refuse the application, and the costs of it will be costs in the second cause, to which all persons interested are parties.

I may add that rule 26 of Order XXXVI. was certainly meant and intended to meet cases of this kind, which might before the Act have been dealt with without a jury. And there were no cases in the Common Law Courts, except possibly some cases under the *Common Law Amendment Act* and cases of arbitrations, which could be so dealt with.

The Vice-Chancellor's order was passed and entered by the Registrar on the 14th of June. On the 24th of June the Syndicate gave notice of appeal from the order.

The appeal came on to be heard on the 8th of July.

C. A.
Argument.

Southgate, Q.C., *Bristowe*, Q.C., and *W. P. Beale*, for the Appellants.

Ingle Joyce (*Dickinson*, Q.C., and *Davey*, Q.C., with him), for the Respondents, took the preliminary objection that the appeal was brought too late. The application to the Vice-Chancellor having been refused, the twenty-one days for appealing limited by Order LVIII., rule 15, ran from the 27th of May, the date of the refusal.

Southgate, Q.C., and *Bristowe*, Q.C., for the Appellants:—

This is not a simple refusal; there is also an order as to the costs. It was necessary that the order should be drawn up and entered.

[JAMES, L.J.:—There was no reason why the order should be drawn up until you wanted to have the costs taxed. You cannot appeal from an order as to costs alone. An order refusing an

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application is always made in this form. This is a simple refusal of the application, and you are appealing from that.]

If it is decided that we are out of time, then we ask for special leave to appeal.

[MELLISH, L.J. :—You should have made this application before giving your notice of appeal.]

No one is prejudiced by the lapse of a few days. We were misled as to the meaning of rule 15; it was considered in the Registrars' office that the time for appealing from such an order did not begin to run till the order was entered. A case in which fraud is alleged is just the one which would be best tried by a jury, and if that is done the trial can take place in *Staffordshire*, where the property is, and where the witnesses live, and the expense of bringing the witnesses to *London* will be avoided. Moreover, a question of importance on the construction of Order XXXVI., rules 3, 4, 26, arises, viz., whether a Defendant in an action in the Chancery Division has not an absolute right to a jury.

MELLISH, L.J. :—Surely there is no right to a trial by jury in a case like this, which before the Judicature Acts could only have been dealt with by the Court of Chancery. It is a different question whether, if an action which could formerly have been brought only in a Court of Common Law is now brought in the Chancery Division, the parties lose the right to a jury which they would otherwise have possessed.

JAMES, L.J. :—There were some cases in the Court of Chancery in which there was a right to a jury, and there may be still some such cases in the Chancery Division. For instance, the right of an heir-at-law to an issue *devisavit vel non.*

The Respondents' counsel were not heard.

Russell Roberts, for the *Homer Hill Colliery Company.*

Judgment, C. A. James, L.J.

JAMES, L.J. :—

I am clearly of opinion that this appeal ought to have been brought within twenty-one days from the refusal of the application

by the Vice-Chancellor. The mere fact that there was an order made as to the costs of the application makes no difference: the application was simply refused. It is of the utmost importance that there should be no delay in appealing from an order as to the conduct of a cause. The fact that the Appellants chose to delay giving their notice of appeal affords no ground for extending the time. It was the very object of the rule that when an application is simply refused the time for appealing should run from the date of the refusal. I think the appeal is too late. There is no reason for extending the time; there is no case of mistake or surprise, and the Appellants have not been misled in any way. The suits would have been essentially Chancery matters before the Judicature Acts, and they could have been heard then by the Vice-Chancellor without a jury, if in his discretion he had so thought fit. In such a case I am of opinion that discretion still remains. It is essentially a matter of discretion, and this Court will not interfere with the Vice-Chancellor's discretion.

8 Q.B.D. 667, 679

MELLISH, L.J.:—

I am of the same opinion. I think that the rule has purposely made the distinction between the granting and the refusing of an application. When an application is granted, the exact terms of the order may be very material, and therefore the party who desires to appeal is to have twenty-one days for doing so from the time when he knows what the terms of the order are. But, when an application is refused, the party who desires to appeal is the one who has made the application, and whose duty it would be to draw up the order, and, if he were to have twenty-one days to appeal from the time of entering the order, he might delay the matter indefinitely. In my opinion it makes no difference that after an application is refused an order is made as to the costs; if it did, the distinction between granting and refusing an application would be practically abolished. I think, therefore, that this appeal is too late. I also agree with the Lord Justice that this is not a case in which special leave to appeal ought to be given, for the case is essentially a Chancery one, and the Court has a discretion whether there shall be a trial by jury.

8 Q.B.D. 667, 679

7 Ch.D. 24

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BAGGALLAY, J.A.:—

I am of the same opinion.

Solicitors for Appellants: *Burton, Yeates, & Hart,* agents for *Johnson, Barclay, & Johnson, Birmingham.*

Solicitors for Respondents: *Gregory, Rowcliffes, & Rawle,* agents for *Bernard & King, Stourbridge; Tucker & Lake,* agents for *Wragge, Evans, & Jesson, Birmingham.*

C. A. 1876 V.-C. B. *April* 26. C. A. *July* 10, 11, 18.

ADIE *v.* CLARK.

[1862 A. 87.]

Patent—Construction—Evidence—Foreign Patent—Licensee.

A licensee of a patented invention was ordered to account for all instruments made by him pursuant to the patent. He alleged that the instruments which he had made were not covered by the patent according to its true construction, and in support of his contention tendered in evidence a prior American specification (a copy of which was in the Library of the Commissioners of Patents, but was not proved to have been known to the patentee) for the purpose of shewing that a construction large enough to cover the instruments made by the licensee would make the patent bad for want of novelty, and therefore ought not to be adopted by the Court:—

Held, that the evidence was inadmissible.

Order of *Bacon,* V.C., reversed.

Trotman v. *Wood* (1) observed upon.

Affirmed by H. of L. 2 Ch. Cas. 423.

Statement.

THE Plaintiff in this case had obtained a patent for a horse-clipper, and had filed a bill against the Defendant for the specific performance of an agreement to take from the Plaintiff a license to make horse-clippers according to the patent. On the 20th of February, 1874, a decree was made for specific performance, and for an account of all machines or apparatus for clipping horses, if any, constructed or arranged according to the Plaintiff's invention, or only colourably differing therefrom, which had been sold by or for the profit of the Defendant.

The license was accordingly settled and executed; and in taking

(1) 16 C. B. (N.S.) 479.

C. A. 1876 ADIE v. CLARK. Statement.

the account the Plaintiff sought to surcharge the Defendant with 34,534 horse-clippers so made and sold. The Defendant contended that he was bound to account only for clippers made by him within the Plaintiff's patent, and asserted that these clippers were not within the patent. The patent was, amongst other things, for the parallelism of certain parts called the comb teeth, and the use of a piece of metal to alter what was called the thickness of the comb plate, and the Defendant used neither of these. He also maintained that the patent could not bear the meaning put upon it by the Plaintiff, for if it did, it would be void for want of novelty; and in proof of this the Defendant gave in evidence certain specifications of American patents which were to be found in the English Patent Office Library.

The matter came before Vice-Chancellor *Bacon* on the 26th of April, 1876, when the same counsel appeared and the same arguments were used as those before the Court of Appeal.

Judgment, V.-C. B.

BACON, V.C., after stating the facts, continued:—

Now *Adie's* patent, assuming its entire validity, is for improvements and for an arrangement and combination of parts. Such a patent may, no doubt, be maintained, but its limits, scope, and effect cannot be lawfully extended. The law upon this subject is expressed by Lord *Hatherley*, when Vice-Chancellor, in the case of *Curtis* v. *Platt* (1), in terms so much more clear and forcible

(1) 1863. Nov. 6. Wood, V.C.

CURTIS *v.* PLATT.

[1863 C. 92.]

THE Plaintiffs in this case were assignees of a patent taken out by one *Wain* for an improvement in spinning mules, and the bill was filed to restrain the Defendants, who were also patentees, from infringing on *Wain's* patent. The object of *Wain's* patent was an improved method of alternately reversing the action of the machinery in self-acting spinning mules, the changes to be made being numerous and complicated. Other patents for this object had been obtained, especially one by *Lakin & Rhodes*, with whom *Wain* had made an arrangement.

Wain, in his patent, claimed for "The novel construction, combination, and application of mechanism as hereinbefore described, whereby one-half of the clutch-box or catch-box hereinbefore and in the specification of *Lakin & Rhodes* described, or any mechanical equivalent therefor, is connected with and acts upon cams or other similar parts of mechanism for effecting the changes in the action of the mule or other machine of the description before mentioned, direct and without the intervention or use of such eccentric boss and rods, levers, or other mechanical

C. A. 1876 ADIE v. CLARK.

than any which I have the skill to employ, that I am glad to avail myself of his language. [His Lordship then stated shortly the

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agents combined therefor, as are described by *Lakin & Rhodes* in their specification."

The Defendants alleged that the patent was void for want of novelty and of utility, and on account of the insufficiency of the specification; they also denied that they had infringed.

The cause was heard before the Vice-Chancellor *Wood*, without a jury, in July, 1863, and His Honour, on the 6th of November, 1863, delivered judgment, finding that the patent was valid, but that the Defendants had not infringed. The judgment contains the following passages:—

Then the question is, how far *Wain* has used this in his patent, and to what extent he can claim a patent right in respect to this invention; and therefore, before reading his patent, I would say a very few words as to what my conception of the patent law is with reference to the rights of an inventor.

In all discoveries of course there are two things—there is an object to be achieved, and a means of achieving that object. Now the object to be achieved may be very old. Of course hundreds of patents have been taken out for achieving objects which in the history of mankind have been achieved by some means or other. No novelty is required as to the object, the novelty may be in the means for effecting the object whether old or new. I agree also with an observation made in the course of the argument, that, on the question of infringement and evasion of a patent for a new object, the Court will scan the process very narrowly, and necessarily give greater weight to any evidence which there may be that this other process for effecting the same object is simply colourable instead of being a *bonâ fide* new invention.

Where the thing is wholly novel and one which has never been achieved before, the machine itself which is invented necessarily contains a great amount of novelty in all its parts, and one looks very narrowly and very jealously upon any other machines for effecting the same object, to see whether or not they are merely colourable contrivances for evading that which has been before done. When the object itself is one which is not new, but the means only are new, one is not inclined to say that a person who invents a particular means of doing something that has been known to all the world long before has a right to extend very largely the interpretation of those means which he has adopted for carrying it into effect. Because otherwise that would be to say that the whole world is to be precluded from achieving some desirable and well-known object which everybody has had in view for years. In such a case it may be said that the means taken are simply mechanical equivalents for the means previously adopted for arriving at the same object. One looks more jealously at the claims of inventors seeking to limit the rights of the public at large for effecting that which has been commonly known to all the world long ago. Of course no patent can be taken out for effecting this as a new object, but only for effecting it by a new means. What those means may be, and what is the extent of a claim which the patentee has a right to insist upon as to those means, is often a matter of much difficulty. We find continually inserted in patents much more than is desirable,

facts of that case, and read extracts from the judgment of the Vice-Chancellor set out in the note below.]

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and they often contain, as here, those large words, "or any mechanical equivalent," on which some observations were made with regard to the particular patent which I have before me. I do not think that they apply with much force to this particular patent from the mode in which they are inserted, and the particular object of inserting them where they are inserted. But in a large majority of cases these words as generally used are wholly useless, and being useless, regard being had to the strictness with which in some senses patents are construed, it would be very much better if the words were wholly left out. They amount simply to this, that if anything is claimed which is a mechanical equivalent in the largest sense, then the claim must be too large, though of course that is not the sense in which the Court could be led to construe them; and in favour of the patentees the Court could only construe them as to give him the benefit which he would have had without inserting the words.

On the part of the Plaintiff in this case it was said the words refer only to a mechanical equivalent colourably introduced. Of course the Court would take care—whether the patentee has put in the words or not—that no person shall be allowed to substitute a mechanical equivalent or a chemical equivalent, as the case may be, for doing the same thing without the slightest degree of invention on the part of the person who substitutes it, or any benefit whatever to be derived from that apparently new mode. . . . I think it extremely important to follow the rule laid down in the House of Lords in *Seed* v. *Higgins* (8 H. L. C. 550), that if you find a specific mechanical improvement claimed, then you must hold the person strictly to that particular mechanical device which he has claimed for effecting the object he had in view; and if he says it is to be done in one precise and particular way, to that precise and particular way he must be held; and those who have *bonâ fide* employed a different system and a different way must not be held to have infringed. For this there is the simple reason: if the patentee had made his claim wider, then the patent would be open to objection, because the Legislature requires as a price for those particular privileges that a man should describe the best way of effecting the operation to which he proposes to apply his patent; and if any better way be discovered, subject, of course, to the question of whether that better way can be used until that previous patent has expired, then it is the case of an improvement. If you are to allow him to claim that which is a better way than that which he has described, then he has not given the public the benefit, and is not to claim protection. That seems exceedingly sound reasoning; and although one is not to be too narrow in scrutinizing or interpreting a patent against a person who is a *bonâ fide* inventor, yet, on the other hand, as to all those who may be proceeding to effect similar objects by other discoveries, the Court is bound to say that they are at liberty to do so provided they do not infringe the precise mechanism claimed for by the patentee. This case is really one of a good deal of nicety, and perhaps some degree of novelty; but upon the whole, perhaps it does not go beyond *Seed* v. *Higgins*. I come to the conclusion that

W.S.C. of Jur. N.S. 1264

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On applying this exposition of the law, which was adopted by Lord *Westbury* on appeal (1), to the case before me, and consider-

this act of Mr. *Platt* is not an infringement.

* * * *

I have several times, and purposely, used the word "escapement," because the analogy was present to my mind. There are escapements for clocks and watches almost innumerable, and all of them must have a very great resemblance, and yet many of them have been patented. Everything in the shape of an escapement must *ex vi termini* consist in presenting to and withdrawing from continuous motion something which arrests or allows that continuous motion. That, of course, is what it is here—the presentation and withdrawing of a known instrument, the inclined plane and pin (I am taking these to be known, and they are not in question before me); and if I held this to be an evasion, I must hold every new escapement that may be invented for a clock or a watch to be in some kind an evasion of any previous patent for an escapement.

(1) 1864. Jan. 18. The Defendants appealed to the Lord Chancellor (Lord *Westbury*), who dismissed the appeal. The following passages will be found in his judgment:—

In that state of things Mr. *Wain*, the Plaintiff, who appears to be a gentleman of great ability and great ingenuity, applied himself to the construction of what he himself denominates an improvement upon the patent of *Lakin & Rhodes*. Now, it has been vigorously contended before me that I am not to take Mr. *Wain's* invention as he himself describes it—that I ought not to allow him to be limited to his own description of its being an improvement—but that I ought to take his invention as containing in itself a new and original principle. He himself has described it and sought protection for it in the character of an improvement. He speaks of it as something supplemental to the original patent, and the language of his patent is such, and the effect of his patent is such, that without the license of the original patentees of *Lakin & Rhodes* it would not be competent to Mr. *Wain* to have the benefit of his invention until the patent of *Lakin & Rhodes* had expired. The object of the contest to give Mr. *Wain's* invention this extended character is quite plain, because it is desired to take it out of the rule which has been applied in the case in the House of Lords, and very properly applied, and, if possible, therefore to give it the character of having accomplished a result so as to enable the inventor to say that the means for arriving at the same result, though different in form, would be an infringement of his invention. I cannot so take it. I must take Mr. *Wain's* patent as being specific mechanism, directed to a certain end that was previously well known, directed to facilitate a certain result the benefit of which had long been discovered, directed to produce in a more simple and easy manner a particular operation of the clutch-box, which was itself only a means to an end. The clutch-box is the proximate means of making a pause in the rotation of the shaft. The mechanism that Mr. *Wain* describes is the proximate means of making the clutch-box operate for the purpose of making a break in the rotation of the shaft, it is therefore nothing more than a particular means for effecting a given result. That

ing the whole of the evidence, I am convinced that the machines made by *Clark* since the agreement are not made according to *Adie's* patent.

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being so, I cannot but think that in patents of that description the doctrine of mechanical equivalents is not by any means applicable. The thing itself is nothing more than a particular agent for attaining a certain end, and if Mr. *Wain* was entitled to a patent for the particular agency by which he effected in a more convenient manner the opening and shutting of the clutch-box, any person is, on the same principle, entitled to a patent for the means of effecting the same result, provided those means are not a colourable evasion of Mr. *Wain's* patent, or provided those means do not embody Mr. *Wain's* patent with an improvement.

* * * *

I have already said a word or two upon what I believe to be the doctrine of mechanical agents, and I entirely agree in the conclusion which the Vice-Chancellor has derived from the decision of the House of Lords. If the invention be as I have already described, nothing more than a particular means to attain to a given result which is perfectly well known, then you can no more say that the invention of one distinct set of means interferes with the invention of another than you could say originally that there ought not to be patents for the inventions of distinct means to an end. I would illustrate it familiarly by this example. If we suppose a patent for a ladder to go down a pit, that patent may be made to comprehend all ladders, whether constructed of wood or of iron, or of hemp or of wire, but if another man invented a mode of letting men down the pit by a rope and pulley, it would be impossible to say that the one means of attaining that particular end was to be regarded as identical with or comprehended in the other.

* * * *

I have anxiously considered this case, because it is extremely desirable that when a beneficial idea has been started by one man, he should have the benefit of his invention, and that it should not be curtailed and destroyed by another man simply improving upon that idea; but if the idea be nothing more than a discovery of a road to attain a particular end, it does not at all interfere with another man discovering another road to attain to that end any more than that of one man having a road to go to *Brighton* by *Croydon* interferes with another man who has a road to go to *Brighton* by *Dorking*. They are the roads and means of attaining the end, and unless you can prove that one is a colourable imitation of the other, or bodily incorporates the other with merely an addition, it is impossible to say that they shall not be co-existent subjects of contemporaneous patents.

Now that is the conclusion that I come to in this case. I am sorry to find these inventions in collision, but I am bound to say that merit is due to the second. I am bound also to say that the invention of the one appears to me to have been arrived at originally by a process of thought in which the one did not derive assistance from the knowledge of the other. I must, however, guard myself by remarking that I do not in the smallest degree put my judgment upon what Mr. *Platt* has sworn, that he knew nothing of *Wain's*, because if his invention was capable of being accurately represented as an imitation of *Wain's*, it would be

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[His Lordship then referred to the judgment of the Court of Appeal in *Clark* v. *Adie* (1), as shewing that *Clark's* clipper was superior to *Adie's*.]

The last topic urged in behalf of *Adie* which I feel it requisite to mention was the suggestion that at all events *Clark's* machines were made in imitation of *Adie's*. If by imitation is meant external similarity or resemblance more or less, this may be so; but this must of necessity be so in all cases where machines consist of a combination of well-known or long-practised mechanical principles or mechanical contrivances. And whatever may be the similarity, *Clark's* machine is no more an imitation of *Adie's* patented invention than it is an imitation of the numerous other preceding machines in which toothed reciprocating cutters moved by handles were used for the purpose of shearing superfluous hair.

There are two points, and two only, which (apart from the arrangement which is the subject of the patent by *Adie*) appear to present an appearance of novelty in *Adie's* patent invention. They are the parallel endings of the comb points, and the under-plate by which the thickness of the machine may be increased. Neither of these has, as appears by the evidence, been adopted by *Clark*. The absence from *Clark's* machines of the two particulars lastly mentioned is apparent to ordinary eyesight, and upon the best consideration I have been able to give to the subject, dealing with the question of fact, which is the only question before me, I have come to the conclusion that the machines made by *Clark* since the date of agreement are neither an infringement of *Adie's* patent nor

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no less an imitation or an embodiment in the eye of the law, if at the time of making his invention Mr. *Platt* was innocent of any knowledge of Mr. *Wain's* invention. But I find in *Platt's* what I consider to be the elements of original thought, taking the materials before him and combining them for a particular purpose. I find in *Wain's* also the same elements of original thought, and the inventive faculty of the one has led him to one combination, and the inventive faculty of the other has led him to another combination, which cannot, in my opinion, be confounded with the first, and therefore I cannot hold that *Platt's* invention is in any matter whatever to be regarded as the same thing in the eye of the law as *Wain's*. I must, therefore, entirely confirm the judgment of the Vice-Chancellor, and adopt the conclusion at which he has arrived, that there is in this case no infringement.

(1) Law Rep. 10 Ch. 667.

an adoption of the improvement for which that patent was granted, nor an imitation thereof. The surcharge therefore fails, and must be disallowed.

The Plaintiff appealed, and the appeal came on to be heard on the 10th of July, 1876.

Argument.

Sir *J. Holker*, A.G., Sir *H. Jackson*, Q.C., and *Lawson*, for the Plaintiff, contended that *Clark's* horse-clippers were made according to *Adie's* patent, and that *Clark* must account for the profits. He cannot, after all this litigation, and all that has taken place, now for the first time deny that his clippers are made according to the patent.

Kay, Q.C., *Fry*, Q.C., *Aston*, Q.C., and *Everitt*, for the Defendant, said that the horse-clippers made by him were not within *Adie's* patent according to its proper construction. It must be construed so as to be valid, and if the construction now put upon it was true, then the whole patent was void for want of novelty, which the Court will strive against. As evidence of this we propose to read the specifications of certain American patents for clipping instruments, which are to be found in the library of the Patent Office.

[This evidence was objected to, but allowed to be read *de bene esse*.]

We must assume that the Plaintiff knew of this specification. For many years shearing instruments had been the subject of patents, especially in *America*, and a copy of a patent in the *British Museum* has been held to be notice to every one: *Hindmarch* on Patents (1).

No doubt, as a general rule, a licensee cannot dispute the validity of the patent, and we do not use the evidence for that purpose; but if the Plaintiff puts a construction upon his patent which brings the machines made by the Defendants within the patent, then the patent would be void for want of novelty; the Court will therefore not put that construction upon it. The Defendant is not to account for horse-clippers generally, but only for those within the patent, and we say that those he has made are not within the specification and drawings.

(1) Page 108.

C. A. 1876 ADIE v. CLARK. Judgment, C. A.

July 18. JAMES, L.J., now delivered the judgment of the Court (*James*, L.J., *Mellish*, L.J., and *Baggallay*, J.A). After stating the facts of the case and the evidence as to the similarity of the instruments, His Lordship stated that the Court had come to the conclusion that the clippers were absolutely identical in design and construction, *Clark's* No. 2 being *Adie's* improved and modified in some details, so as to move and work more easily. His Lordship then proceeded:—This is met by the Defendant in this way. He says, "True it is that if the machine, the horse-clipper produced by the Plaintiff, is the thing protected by the patent—if the whole of that is the invention—then there is no denying that *Clark's* No. 2 is an imitation of *Adie's*, and no doubt *Clark* for a long time acted under the belief that *Adie's* clipper in its entirety was so patented, and that explains the acts and conduct which have been relied on as an estoppel. But he has been since better advised, and now denies that the patent covers the whole horse-clipper."

And the way that is made out is by producing a volume deposited in the Patent Office containing descriptions of American patents, and also some prior specifications of English patents.

Of course it is said that as licensee it is not competent to the Defendant to dispute the validity of the patent, and it is admitted, therefore, that the documents cannot be used directly to shew want of novelty. But they are made available and used in this way. A licensee is entitled to shew the limits of the patent, and that he is outside those limits. And in construing a patent this is always to be observed, that you will so construe it as that it shall be a valid and not a void patent. If you construe this patent one way, then the documents produced shew that the patent is bad for want of novelty, and you ought therefore to construe it so as to protect it from that conclusion.

The counsel for the Plaintiff objected to the admissibility of this evidence, but as it had been admitted and acted on by the Vice-Chancellor we admitted it *de bene esse*. We think, however, that we ought to give our decision on the objection, and we are of opinion that the evidence is clearly inadmissible for the purpose of construing the specification of the particular patent before us.

The admissibility was put on some expressions in the judgment

of the learned Judges in the case of *Trotman* v. *Wood* (1), relating to *Trotman's* anchors. They are only *dicta*, because no such evidence was acted on in that case. It was never meant by the learned Judges, and it cannot be effectually contended, that there is any principle to be applied to the construction of specifications which differs from that applicable to the construction of every written instrument whatever. Of course in ascertaining the meaning of words used, you endeavour to put yourself as much as possible in the position of the person using them. What a testator knew is commonly resorted to in construing his will. Facts within the knowledge of both the parties to a written contract may be very material in understanding the precise meaning of the expressions used by them. So, in a specification which is addressed by a man having knowledge of the subject to people having also knowledge of the subject, or to that portion of the public who have or may have an interest in it—that which is clearly matter notorious to the world at large—that which is matter within the common knowledge of the trade or of persons conversant with the article, may be resorted to for the purpose of limiting the construction of a specification or of a claim in it to this extent, and to this extent only. You assume that a patentee would not be so absurd as to claim that which he knew, and that which he knew everybody else knew, to be old, and you would, if possible, avoid that absurdity, if by any legitimate construction of the words used you could do so.

But this is a very different thing from construing a man's language by the production of a document which, so far as appears, the man never saw or heard of—from construing a specification and claim which is intended for the information of the public by the production of a document which, so far as appears, no one of the public ever saw or heard of.

As used in this case it was not used really for the purpose of assisting in the construction, or of ascertaining what was meant by the patentee in the language he used, but as a device to escape from the clear rule which prevents a licensee from disputing the validity of the patent. What was really attempted to be made out was this: A great part of that which is covered by the patent

(1) 16 C. B. (N.S.) 479.

C. A. 1876 ADIE v. CLARK. Judgment, C. A.

is old, and therefore bad; some little part is new, and therefore good; the Court will confine the patent to that which is new and good. That device will not succeed. A licensee cannot, under any pretence whatever, bring his licensor into litigation as to the novelty of any part of the patent.

Independently of the aid to the construction supposed to be given by the documents which were so produced, and which we hold to be inadmissible, the Defendant has really no case whatever. We think it right to add that, in our judgment, the admission of those documents would not enable us to limit the construction of the claim in the way suggested by the Defendant. The Defendant's suggestion is, that the only novelties in the ~~Defendant's~~ Plaintiff's instrument are the parallelism of the comb teeth and the use of a second piece of metal to alter the thickness of the comb plate. It is difficult to suppose that any human being could ever have seriously intended to patent such things as the exact parallelism of the teeth of a comb; or the suggestion that a thing might be made thicker, if desired, by placing and fastening an additional piece under it.

We certainly could not depart from the plain words of the specification to attribute a meaning so absurd to the patentee. To hold that the patent is good for that, and that only, would be in effect to hold, at the instance of a licensee, that the patent is good for nothing. To this it may be added that the parallelism and the extra piece are only to be found in what the patentee describes as details, which he expressly says may be altered.

We are of opinion that the Appellant, the Plaintiff, is entitled to surcharge the Defendant with all the instruments known as *Clark's* No. 2, or No. 1, and the matter will go back to Chambers with a declaration to that effect.

Having regard to the mode in which the matter has been controverted, both in the Court of the Vice-Chancellor and here, and the possible prejudice to the Plaintiff from the decision of the Vice-Chancellor, we think it right to add that we have seen no reason to doubt the validity of the Plaintiff's patent as a patent for the horse-clipper described in the specifications, and the drawings thereto annexed.

We have thought it right to deal with and dispose of the case as

C. A. 1876 ADIE v. CLARK. Judgment, C. A.

it was presented in the Court below and here; but there is a question which it is sufficient to indicate, whether the Defendant's contention is not precluded by the language of the decree. The words are, "that an account be taken of all machines or apparatus for clipping horses (if any) constructed or arranged according to the said invention or only colourably differing from the machine described in the specification and drawings to the said letters patent, &c., which have been sold by or by the order or for the profit of the Defendant," apparently assuming and implying that the machine so described is the invention protected by the patent and covered by the decree.

The Plaintiff must have the costs here and in the Court below.

Solicitor for Plaintiff: *J. H. Johnson.*
Solicitor for Defendant: *H. Jarman.*

TAYLOR *v.* TAYLOR.

C. A. 1876 *July* 25.

[1873 T. 99.]

Settled Estates Acts, 19 & 20 *Vict. c.* 120, *s.* 16; 37 & 38 *Vict. c.* 33, *s.* 3—*Lease—Concurrence—Trustee.*

The Court, on the peculiar construction of a will, and having regard to the peculiar nature of the property, refused to authorize a lease dispensing with the concurrence of a person who was a trustee and also beneficially interested.

Observations on the construction of the *Settled Estates Act*, s. 16, as to the persons entitled to petition.

Order of the Master of the Rolls affirmed.

8 Ch D
24 Ch D
239

Statement.

THIS was an appeal from an order of the Master of the Rolls refusing to grant, under the Settled Estates Acts, a lease dispensing with the concurrence of a person who was a trustee and had a beneficial interest; as reported (1).

Argument.

Bagshawe, Q.C., and *F. G. Bagshawe*, for the Appellant, the tenant for life.

Ince, Q.C., and *Laing*, for the remainderman, objected to the

(1) 1 Ch. D. 426; see also Law Rep. 20 Eq. 297.

C. A. 1876 TAYLOR v. TAYLOR. Argument.

lease being granted without his concurrence, and read evidence shewing that the property was let to tenants at weekly rents; that the testator kept it in his own hands, having found that no solvent person would take a lease, and that when he granted a lease the houses were left at the end of the time in a bad state of repair. The property was leasehold, and if it was not kept in repair the liabilities would be grievous. Under such circumstances, a lease might be very good for the tenant for life, it might be very bad for the reversioner.

Bagshawe, Q.C., in reply.

Judgment, James, L.J.

JAMES, L.J.:—

The Master of the Rolls has not decided anything on the general construction of the Act, but he has decided that, having regard to the very peculiar construction of this will and to the peculiar mode in which the rents and profits of part of the property are to be applied in repairing the whole, it is in this case impossible to authorize leases.

Having regard to the nature of Mr. *Keily's* interest in the property, and the reasonable objections he may have to granting leases at all of such a property as this, and to having leases granted in which he is not a concurring party—having regard also to the power given to him as trustee to manage, and the perilous position he would find himself in with regard to the covenants if the property were let, I am of opinion that his opposition was an opposition which would have been perfectly fatal under the old Act, and is an opposition to which, under the new Act, the Master of the Rolls was quite right in giving overwhelming weight, and he was right in saying that it was not intended by that Act that any person's interest could be interfered with. I think that Mr. *Keily* has a right to contend that he can point out various things which make him object to giving to anybody a lease in which he does not concur. That is sufficient to determine the case on an appeal from the Master of the Rolls.

Having regard to the other points, I should have required more time to consider the construction of the Acts of Parliament if I thought that the decision of the Master of the Rolls could be con-

sidered as a decision that a tenant for life who is to receive the rents and profits during her life through the hands of a trustee, is not the tenant for life within the meaning of the Acts, but I take the decision of the Master of the Rolls to be based on the very peculiar provisions of this will, the mode in which the property was divided into two parts, and the mode in which the rents of one part, which were his own, are devoted to the repair of the whole, and the provisions compelling the trustees to repair, and so on; and there is a strong indication of intention on the part of the testator that the management should not be taken out of the trustees by an application under the Act or otherwise, except by the Court itself appointing a receiver. I am of opinion the Master of the Rolls' decision should be affirmed, and the appeal dismissed with costs.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors: *Harting & Sons; Keily.*

V.-C. M.
1876
May 16.

HATTON *v.* MAY.

[1875 H. 82.]

Purchase of an Annuity—Conditional Limitation—Restraint on Alienation.

Post 287.
ch D. 721.

A testator directed his trustees to purchase out of his residuary estate from Government an annuity for *M.*, a single woman, who was not to be entitled to elect to receive the price or value of the annuity in lieu thereof, and he directed such annuity to be paid to her for her separate use, and that if she should at any time sell, assign, incumber, or in anywise dispose of or anticipate such annuity, or any part thereof, the same should cease and be void, and should sink into the residue :—

Held, that *M.* was not entitled to the value of the annuity, but that the annuity was to be purchased by the trustees, and held by them to pay to *M.* until she should do any act of alienation.

Statement.

THOMAS MACAULEY, by his will, dated the 26th of July, 1872, gave all the residue and remainder of his property, estate, and effects, to *George Hatton* and *Sidney Smith*, their executors, administrators, and assigns, upon trust to convert the same into money, and to purchase thereout from Government an annuity of £100 sterling for *Mary Ann May* during her life, and which he gave to her accordingly ; and after directing three other annuities to be purchased in the like manner for each of his three daughters, he declared that the said *Mary Ann May* and his three daughters should not, nor should either of them, nor should their personal representatives respectively, in case of the death of either of them before such purchase, be entitled to elect to receive the price or value of the said annuity in lieu of it ; and he declared that all and every the annuities given by his will to *Mary Ann May* and his said daughters were so given for their sole and separate benefit and disposal as the same should be from time to time payable independently and exclusively of, and so as not to be subject to the control, debts, or engagements of any husband, and to be paid to the respective proper hands of the said *Mary Ann May* and his said daughters respectively, and their respective receipts given when and as the same respectively became due and payable, to be alone and only proper discharges for the same ; and he expressly declared that if any of the said annuitants should at any time sell,

alien, assign, transfer, incumber, or in any wise dispose of or anticipate the said respective annuities, or any part thereof, then and in such cases respectively, and immediately thereupon, the same annuity to such annuitant should cease, determine, and be void, and should sink into and become part of the residue of his personal estate and effects. And upon further trust that his said trustees should pay all the residue of his trust moneys, after making such purchases and deductions as aforesaid, and all other (if any) his personal estate, property, and effects, unto the conductor of an orphan asylum therein named, to be applied for the use of such asylum.

Statement.

By a codicil to his will dated the 26th of July, 1872, the testator appointed *Mary Ann May* and *Sarah Morgan* to be trustees and executors of his will jointly with *G. Hatton* and *S. Smith*. He died shortly afterwards, and left a considerable amount of property beyond what was specifically bequeathed by his will. All the annuitants were alive. The bill was filed by *G. Hatton*, *S. Smith*, and *Sarah Morgan*, against *Mary Ann May* for the administration of his estate, and for a declaration as to the rights of *Mary Ann May* in respect of her annuity.

The Defendant *Mary Ann May* had required her co-executors, the Plaintiffs, to pay her such a sum as would be required to purchase a Government annuity of £100 for her life, but the Plaintiffs were advised that it was doubtful whether she was entitled to this payment.

E. Cutler, for the Plaintiffs :—

Argument.

It has frequently been decided that an annuity may be given, with a restriction against alienation. Where there is a gift over, by a direction that the annuity shall fall into the residue, that is equivalent to a gift over to a specified person : *Lloyd* v. *Branton* (1). In *Shee* v. *Hale* (2) a condition against alienation by an annuitant was held to be broken by taking the benefit of the *Insolvent Act*. Your Lordship's decision in *Power* v. *Hayne* (3) goes fully to the extent that a clause restricting alienation may be validly annexed to an annuity to a person *sui juris* where there

(1) 3 Mer. 108, 117.
(2) 13 Ves. 404.
(3) Law Rep. 8 Eq. 262.

V.-C. M. 1876 HATTON v. MAY. Argument.

is a gift over. That case is, no doubt, opposed to the opinion expressed by Vice-Chancellor *Kindersley* in *Day* v. *Day* (1), but there is no doubt that your Lordship's opinion is in conformity with many of the older authorities. The principle is very clearly laid down in *Woodmeston* v. *Walker* (2), where Lord *Brougham* pointed out that if a testator was desirous to give an annuity without the power of anticipation, he could only do so by declaring that the act of alienation should determine the interest of the legatee and create a new interest in another. There can be no doubt what the intention of the testator was in this case, and to allow *Mary Ann May* to take an actual sum of money sufficient to purchase an annuity which she may at once spend, leaving herself destitute for the future, would entirely defeat the testator's intention.

Speed, for the residuary legatee:—

The case of *Allen* v. *Jackson* (3), in which the decision of Vice-Chancellor *Hall* was reversed by the Appeal Court, confirms the view taken by your Lordship in *Power* v. *Hayne* (4), and decides in effect that there is no difference in substance between a condition on which the property is to go over on the one hand, and an alternative limitation on the other.

J. Pearson, Q.C., and *Byrne*, for *Mary Ann May*:—

The case of *Power* v. *Hayne* does not apply, as the gift of an annuity was in that case preceded by a life interest, and the annuitant died in the lifetime of the tenant for life, without having done any act to bring into operation the clause restraining alienation. A gift in the form of that in the present will is subject to a different rule from that applicable to a limitation until bankruptcy or alienation. Such limitations are valid, whereas, in this case, there is an absolute gift in the first instance, which cannot afterwards be cut down: *Ross* v. *Ross* (5); *Bradley* v. *Peixoto* (6); *Rishton* v. *Cobb* (7). In *Allen* v. *Jackson* Lord Justice *James* said (8):

(1) 1 Drew. 569; 22 L. J. (Ch.) 878.
(2) 2 Russ. & My. 197, 204.
(3) 1 Ch. D. 399.
(4) Law Rep. 8 Eq. 262.
(5) 1 Jac. & W. 154.
(6) 3 Ves. 324.
(7) 9 Sim. 615.
(8) 1 Ch. D. 404.

"The gift in the first instance is expressed as a gift to him for life, with a condition defeating it, which may bring it within some of the cases, and perhaps we ought not to appear to overrule them without more necessity for doing so." Therefore his Lordship expressly guarded himself against overruling those cases in which there was first an absolute gift, but that case belongs to a class which have nothing to do with the question. In *Bayley* v. *Bishop* (1), a direction to lay out money in a joint annuity was held to be an absolute bequest of money to the legatee. The only effect this clause can have is to prevent the annuitant from disposing of the capital after the annuity has been purchased.

[They also cited *Barnes* v. *Rowley* (2).]

MALINS, V.C.:—

The cardinal rule in construing wills is to look at the whole of a will, in order to ascertain the intention of the testator. If the direction to the trustees to purchase an annuity for *Mary Ann May* had stood alone, it would, according to the authorities, have entitled her to be paid the price for which a Government annuity could be purchased; but to ascertain whether that is the effect of the bequest, you must look at the whole of the will, and if you see that such is not the intention of the testator, but that there is an event specified upon the happening of which the annuity is to be cut short, then you must pay the amount to the annuitant so long only as her title to it endures. By the first clause the annuitant gets so much money as will buy the annuity, but the testator subsequently shews his anxiety that this annual sum shall be a personal benefit for her. He says that *Mary Ann May*, and each of his three daughters, "shall not, nor shall either of them, be entitled to elect to receive the price or value of the annuity in lieu of it;" but notwithstanding that, it has been argued that the annuitant is entitled to have a sum of money in lieu of the annuity. Then he goes on to direct that all the annuities given by his will "are so given for their sole and separate benefit and disposal, as the same shall be from time to time payable, independently and exclusively of and so as not to be subject to the control, debts, or

(1) 9 Ves. 6. (2) 3 Ves. 305.

V.-C. M. 1876 HATTON v. MAY. Judgment.

engagements of any husband she may marry." If he had stopped there it would have been like the case of *Woodmeston* v. *Walker* (1). It would have been a gift to the separate use of each annuitant, and *Mary Ann May* might simply have elected to take the money; but then, in order to carry his intention into effect more fully, he declares "that if any of the said annuitants shall at any time sell, alien, assign, transfer, incumber, or in anywise dispose of or anticipate the said respective annuities, or any part thereof, then and in such cases respectively, and immediately thereupon, the same annuity to such annuitant shall cease, determine, and be void, and shall sink into and become part of the residue of my personal estate and effects." Now, therefore, he has commenced by giving an absolute annuity, but he has declared she shall not take it if she aliens, assigns, transfers, incumbers, or in anywise disposes of it, and if she does, then it is to be void and to sink into the residue.

This is clearly settled, that if you give an annuity till the happening of any specified event, that is the measure of its limitation. It may be cut short by a conditional limitation which abridges the estate. That is distinctly laid down in *Fearne* (2), where the difference is stated between a contingent remainder and a conditional limitation, so that the gift is to her for life, and if she does certain acts, then the interest is to be cut short. That is a conditional limitation, that in case she alienates the annuity it is to be void and to go over. What sort of law is it, then, which says that a testator has no power to prevent an annuitant from having a power of alienation? The case of *Shee* v. *Hale* (3), which is not by any means the first case laying down the rule, was a bequest of an annuity with a condition that it should fall into the residue upon alienation or insolvency, and the condition was held to be broken in taking the benefit of the *Insolvent Act*, and the annuity was forfeited.

That rule having been solemnly settled, I have always relied upon it as one of the fixed principles of the law, and I have never known it questioned.

Now, this case is not a new one. The point was argued in *Day*

(1) 2 Russ. & My. 197. (2) Page 10, note h.
(3) 13 Ves. 404.

v. *Day* (1). I need not say that I entertain the highest respect for the decisions of my learned predecessor, but that case was produced in argument in the case of *Power* v. *Hayne* (2), and having carefully looked into the case and fully considered the judgment, and delayed giving my decision, I deliberately came to the conclusion that I could not follow it, because I thought that if the trustees had paid over the value of the annuity to *Charles Day*, and he had afterwards become bankrupt, they could have no answer whatever to the persons entitled under the gift over. The views I then expressed are to my mind conclusive. That case decides that you can give an annuity with a provision for its going over in case of alienation.

The will says there is an annuity to be purchased, which is to be paid to *Mary Ann May* for her separate use, and if she commits any act of alienation it is to fall into the residue. What is the difficulty of carrying that direction into effect? My attention was drawn to the case of *Woodmeston* v. *Walker* (3) by Mr. *Cutler*, in which the very same question arose. It is a case I well remember, for I heard all the arguments in it, and they made considerable impression upon me at the time. The case was this: a testator directed that one-third of his residuary estate should be invested in the purchase of an annuity for the life of his sister, who was unmarried, and this annuity he gave to her separate use and independently of any husband she might marry, and without power to sell or assign the same by anticipation. The Master of the Rolls, Sir *J. Leach*, refused to order payment to the legatee of the price which would be paid for the annuity, on the ground that the restraint against alienation would be valid in case of future coverture. That decision was reversed by Lord *Brougham*, who said (4): "If a testator be desirous to give an annuity without the power of anticipation, he can only do so by declaring that the act of alienation shall determine the interest of the legatee and create a new interest in another. There is no gift over in the present case, which is that of a mere naked prohibition, not guarded by any clause of forfeiture." He also previously says, "Where the subject is a personal chattel, it is impossible so to tie up the use and enjoyment

(1) 1 Drew. 569. 17 Jur. 586.
(2) Law Rep. 8 Eq. 262.
(3) 2 Russ. & My. 197.
(4) Ibid. 204.

V.-C. M. 1876 HATTON v. MAY. Judgment.

of it as to create in the donee a life estate which he may not alien. Although the object may be attained indirectly, in a manner consistent with the known rules of law, by annexing to the gift a forfeiture or defeasance on the happening of a particular event, or on a particular act being done . . . and upon the happening of the event or the doing of the act a new and distinct estate accrues to a different individual." That is exactly what this testator has done. The annuitant is not to have the right to take money instead of the annuity, and it is to be inalienable. Nothing can be better expressed or more consonant with every rule of law. The cases cited by Mr. *Pearson*, such as *Barnes* v. *Rowley* (1) and *Bayley* v. *Bishop* (2), where property was given absolutely, have nothing to do with this question. Such was the case of *Bradley* v. *Peixoto* (3). There the words were, "I give to my son the dividends arising from £1620 Bank Stock for his support during his life, but at his decease the bank stock to devolve to his heirs, executors, administrators, and assigns"; and he went on to say that if his son attempted to dispose of the principal such attempt should exclude him from any benefit in his will, and he should forfeit the whole of his share, principal and interest, which should be divided among his other children. The son filed a bill that he might be declared entitled to the bank stock absolutely. The Master of the Rolls said it was laid down as a rule long established, that where there is a gift, with a condition inconsistent with and repugnant to such gift, the condition was wholly void. He considered that the condition in that case was inconsistent with the interest given to the legatee in the stock, and was therefore void. No wonder that was held to be void; if this were a gift to *Mary Ann May* absolutely I should say the same.

I think the whole case was decided by me in *Power* v. *Hayne* (4) in a manner I am still quite satisfied with. I decided that case after much consideration. The arguments were heard on the 7th of May, and I took till the 28th before I delivered my judgment, and during that time, as my habit is, I looked into all the cases cited. My decision, therefore, was the result of careful investigation of the authorities, and I desire to be understood as adhering,

(1) 3 Ves. 305.
(2) 9 Ves. 6.
(3) 3 Ves. 324.
(4) Law Rep. 8 Eq. 262.

to that decision, and repeating the rule of law I there laid down, that in the case of gift to a tenant for life, either to *A.* until a certain event should happen or for a whole life, with a proviso that it shall cease on the happening of a particular event, the restriction is clearly effectual.

If there could have been any doubt in this case it is removed by *Allen* v. *Jackson* (1). That is, to my mind, completely in accordance with the rules I have laid down. There a testatrix gave the income of certain property to her niece and her niece's husband during their joint lives, and to the survivor during his or her life, with a proviso that if the husband survived his wife and married again the property should go over. The husband survived his wife and married again. It was there held that this was a limitation to the husband while remaining a widower, that the proviso was valid, and upon the husband marrying again the gift over took effect.

I should take the present case to be a conditional limitation cutting short the first gift. *Mary Ann May* is not to take the annuity in money and is not to alienate. Mr. *Pearson's* construction would entitle her to take the whole, so that she might spend the money the day after receiving it, leaving nothing for her support during the remainder of her life.

My opinion is that she is entitled to the annuity only for her life, or until alienation.

The decree will be that an annuity is to be purchased for *Mary Ann May* in the names of the trustees, and to be paid to her for life or until she shall alien, assign, transfer, incumber, or in anywise dispose of or anticipate the said annuity, or any part thereof.

Solicitors for all parties: *Boulton & Sons.*

(1) 1 Ch. D. 399.

V.-C. M.

1876

May 20.

In re BROWN AND SIBLY'S CONTRACT.

Appointment—Remoteness—General Devise—Trust Estates.

By marriage settlement, dated in 1821, real estate was conveyed to trustees to the use of the settlor, *W. M.*, for life, and after his death to the use of all or any exclusively, of the children, grandchildren, or other issue of *W. M.* (to be born before the appointment was made), as he should by deed or will appoint, and in default, to the uses therein declared. By will, dated in 1867, *W. M.* appointed the estate to his son *W. E. M.* in fee, but in case he should have no child who should attain twenty-one, then to the settlor's grandson *W. M. B.* in fee:—

Held, that the executory gift over to *W. M. B.* was void for remoteness.

Trust estates held to pass under a general devise notwithstanding a charge of legacies; the devise passing all the real estate vested in the testator whether on trust or beneficially, and the charge affecting only such estate as belongs to him beneficially.

Statement.

THIS was a summons under sect. 9 of the *Vendor and Purchaser Act*, 1874 (37 & 38 Vict. c. 78), raising two questions of title. The summons was adjourned into Court for argument.

By an indenture of settlement dated the 10th of November, 1821, made upon the marriage of *William Metford* and *Mary Eliza Anderdon*, certain freehold property was conveyed to *F. Anderdon*, *W. P. Anderdon*, *J. M. Charten*, and *Joseph Metford*, to hold the same to the use of *W. Metford* for life, and after his decease to the use of *M. E. Anderdon* for her life; and after the decease of the survivor, to the use of all or any one or more exclusively of the children, grandchildren, or other issue of *W. Metford*, either by *M. E. Anderdon* his intended wife, or by any future wife or wives (such grandchildren or other issue to be born before such appointment as thereinafter mentioned should be made to him, her, or them respectively) in such manner and form, and if more than one, in such shares and proportions, and for such estate or estates, interest or interests as therein mentioned, and with such limitations over, and to be vested at such age or ages, day or days, and upon such contingencies, and under and subject to such conditions and restrictions, and generally in such manner in all respects as the said *William Metford* at any time or times, or from time to

time, during his life by any deed or deeds, or by his last will and testament, or any codicil or codicils thereto, should direct, limit, or appoint; and in default of such direction, limitation or appointment, to the use of the child, if only one, or if more than one, then all and every the children of the said *W. Metford*, either by *M. E. Anderdon* or any future wife or wives, equally to be divided between them, if more than one, as tenants in common and not as joint tenants, and the heirs of the body lawfully issuing.

By the same settlement certain copyholds were covenanted to be surrendered to the use of the trustees, their heirs and assigns, to hold the same to the uses, &c., thereinbefore declared concerning the freeholds, or as near thereto as the different tenure would permit.

Mrs. *Metford* had three children, a son and two daughters; one of the daughters married *R. G. Badcock*, and died leaving a son, *William Metford Badcock*.

W. Metford made his will on the 27th of June, 1867, and thereby, in exercise of the power contained in the settlement, appointed, gave, and devised the property therein comprised unto and to the use of his son *William Ellis Metford*, his heirs and assigns, for ever; and the testator proceeded as follows: "And I do hereby request that in case my said son *W. E. Metford* shall have no child or children who shall attain the age of twenty-one years, that he, the said *W. E. Metford*, shall and will, by deed or will, grant, appoint or devise that either the said lands and hereditaments situate at *Burlescombe*, or the said customary or copyhold hereditaments at *Taunton* shall, after the decease of the said *W. E. Metford* and *Caroline Metford* his wife, go, remain, and be unto and to the use of *W. Metford Badcock*, the son of my daughter *Eliza Julia Badcock*, his heirs and assigns for ever."

The testator died in February, 1868.

In 1873 *W. E. Metford* sold a portion of the property comprised in the before-mentioned settlement to Mr. *Brown*, who subsequently entered into a contract with Mr. *Sibly* to sell a part of the property so purchased by him; and a question had arisen as to whether *W. E. Metford* had an absolute fee simple in the estate, and could make a good title thereto without the concurrence of *W. Metford Badcock*.

V.-C. M. 1876 *In re* BROWN AND SIBLY'S CONTRACT. Argument.

Joshua Williams, Q.C., and *Ingle Joyce*, for the vendor:—

The executory devise by the will of *W. Metford*, in favour of *W. M. Badcock*, is void, as being in contravention of the rule against perpetuities. So far as this rule is concerned, the execution of the power by the will must be read as if the devise had been contained in the settlement of November, 1821. The property was tied up from the date of that settlement. *W. M. Badcock* was not then living, but was born between thirty and forty years afterwards; and the gift over is one which may not take effect until twenty-one years after the death of *W. E. Metford*, a person unborn at the date of the settlement, in favour of another person also unborn at the date of the settlement. Such a gift is clearly void, and the the gift to *W. M. Badcock* being invalid, *W. E. Metford* is absolutely entitled in fee to the appointed property: *In re Edmondson's Estate* (1); *Stuart* v. *Cockerell* (2).

Dunning, for the purchaser:—

The power to appoint in favour of issue is limited to issue coming into existence during the settlor's life; and he has appointed to his son in fee, with an executory gift over in a certain event to a grandson, who was in existence at the death of the settlor. The grandson was an object of the power, and is competent to take, and, under 8 & 9 Vict. c. 106, to dispose of, the contingent estate given to him. In short, the gift over is in favour of a person ascertained within due limits, and competent to deal with the estate given to him.

This makes the case identical with that suggested in *Gilbertson* v. *Richards* (3); and although that case was affirmed in the Exchequer Chamber (4) upon another ground, yet the Court expressly stated that there may be considerable doubt whether the rule as to perpetuities applies to a case where the person to take is ascertained within due limits. The case of *Avern* v. *Lloyd* (5) proceeded upon the same ground; and the Court of Appeal in *Stuart* v. *Cockerell* (6) decided the question upon the sole ground that the intention of the testator was to create a class consisting

(1) Law Rep. 5 Eq. 389.
(2) Ibid. 7 Eq. 363; 5 Ch. 713.
(3) 4 H. & N. 277, 297, 298.
(4) 5 H. & N. 453.
(5) Law Rep. 5 Eq. 383.
(6) Ibid. 5 Ch. 713.

of persons who were only to be ascertained at a time too remote, and abstained from giving any opinion upon what would have been the case if the class had been ascertainable and ascertained at a time within the limits allowed by the rule against perpetuities.

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MALINS, V.C.:—

Judgment.

The point I have to decide under this settlement is free from doubt. The law is settled, that where a person takes property by virtue of the execution of a special or limited power of appointment, he takes directly under the instrument creating the power. Consequently, when *W. Metford* made his will, it was the same as if the words he there used had formed part of the settlement, and as if the property had been conveyed by that settlement to trustees to the use of himself for life, with remainder to the use of his (unborn) son in fee, with a direction that in case his son should have no child who should attain twenty-one, then that the estate should, after the son's death, go over to the settlor's grandson in fee. That is an attempt to make the property inalienable for a period which might extend to twenty-one years after the determination of the life of a person not in being at the date of the settlement. The law does not allow a man to tie up property for longer than a life or lives in being and twenty-one years; and this is clearly an attempt to do what is contrary to the law.

I need not do more than refer to my decision in *Stuart* v. *Cockerell* (1), afterwards affirmed on appeal, which shews that the law is as I have stated it. My opinion, therefore, is that the appointment by the testator to his son in fee is good, and the attempt to give the estate over is void. It is precisely the same as if a man were to give property to his son for life, and after his decease to his son's children, as tenants in common in fee, with a proviso that if any of the children should die under twenty-five the property should go over. In that case the proviso carrying over the shares would be void. The gift to the son in fee is therefore good, and the executory devise over is void.

The second question arose thus:—The four trustees of the settle-

(1) Law Rep. 5 Ch. 713.

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ment of 1821 were admitted to the copyholds, and *W. P. Anderdon* was the survivor of the four. He made his will, dated the 21st of October, 1857, not containing any express devise of trust estates, but commencing, "My property which is not under settlement I give and bequeath as follows;" and after numerous specific and pecuniary legacies, "the rest and residue of my unsettled property I bequeath to my great-nephew *J. E. Anderdon.* My settled property to be disposed as follows after the death of my wife;" and after other legacies, "my freehold house at *Bath* I bequeath to my great-niece *Blanche Simmons,* and to my great-nephew *J. E. Anderdon* I give all the rest and residue of my settled property." And the question was, whether the copyholds vested in the testator as the surviving trustee of the settlement of the 10th of November, 1821, passed to *J. E. Anderdon* under the gift of "the residue of my unsettled property," or descended to the heir of *W. P. Anderdon* according to the custom of the manor.

Judgment.

Argument.

Joshua Williams, Q.C., and *Ingle Joyce,* for the vendor:—

The rule is laid down by Lord *Eldon* in *Lord Braybroke* v. *Inskip* (1), that trust estates will pass under a general devise, unless it can be collected from expressions in the will or the purposes or objects of the testator that he did not mean them to pass, and there is no expression in this will to lead to such a conclusion.

The rule was followed in *In re Stevens' Will* (2), and was approved of by your Lordship in *Martin* v. *Laverton* (3).

Dunning, for the purchaser:—

Whatever passed to *J. E. Anderdon* under the gift of "the residue of my unsettled property" was charged with the payment of all the pecuniary legacies which preceded that gift to him: *Greville* v. *Browne* (4), and *Gyett* v. *Williams* (5). A general devise will carry trust or mortgage estates unless the disposition of the property made by the testator is such as to shew that he is dealing only with that which belongs to him beneficially; a charge of debts or legacies shews that there is no intention to deal with

(1) 8 Ves. 417.
(2) Law Rep. 6 Eq. 597.
(3) Law Rep. 9 Eq. 563.
(4) 7 H. L. C. 689.
(5) 2 J. & H. 429.

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trust estates, and prevents the Court from holding that such estates pass under a general devise: *Doe* v. *Lightfoot* (1); *Roe* v. *Reade* (2); *Lord Braybroke* v. *Inskip* (3): *Ex parte Morgan* (4); *Dimes* v. *Grand Junction Canal Company* (5). The case of *In re Stevens's Will* (6) was not a devise of trust estates, but of a mortgaged estate, the mortgage being a subsisting beneficial interest, and the Vice-Chancellor himself treated it as a case in which mortgage estates might be held to pass, whilst trust estates would not pass. The latest authority on the subject is *In re Packman and Moss* (7), which clearly recognises that the question is one of intention, to be gathered from the whole will. In the present case, the particular frame and wording of the will point exclusively to property in which the testator was beneficially interested; at any rate there cannot be imputed to him an intention to charge trust estates with the payment of his legacies, or to include trust estates which were so charged in the gift to his great-nephew.

Argument.

MALINS, V.C.:—

Judgment.

Notwithstanding the decision of the Master of the Rolls in the recent case of *In re Packman and Moss*, I must say that, in my opinion, the inclination of modern times is to hold that the legal estate in trust property passes by a general devise. It is clear that if a man gives all his real estate, his trust estates will pass. Then if another man says, "I give all my real estate, charged with the payment of debts and legacies," what impropriety is there in saying that the trust estates will pass? The rational and convenient course is to say that trust estates pass, but that the charge affects those estates only which belong to the testator beneficially. The substance of the decision in *Lord Braybroke* v. *Inskip* is that trust estates pass by a general devise, and the decision of Vice-Chancellor *Giffard* in *In re Stevens's Will* is consistent with that view of the case. There the testatrix directed her just debts to be paid. She then gave pecuniary legacies, and gave all the

(1) 8 M. & W. 553.
(2) 8 T. R. 118.
(3) 8 Ves. 417.
(4) 10 Ves. 101.
(5) 9 Q. B. 469.
(6) Law Rep. 6 Eq. 597.
(7) 1 Ch. D. 214.

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rest, residue, and remainder of her real and personal estate and effects to *Jane Tozer* for her own absolute use and benefit. The Vice-Chancellor said that was not the case of a mere trust estate, but of the legal estate in a mortgage, the beneficial interest in which mortgage was vested in the testatrix. The charge of legacies was the point insisted on as being a reason why the legal estate in the mortgaged property should not pass. The modern authorities had extended the cases in which the legal estate in a mortgage had been held to pass, and in the case before him he was of opinion that, subject to the debts and legacies, there was an absolute gift to *Jane Tozer*. He then went on to say: "I do not hesitate to say that in a case such as this, good sense and convenience require that a beneficial gift should carry the legal estate in a mortgage as an incident, and a useful and necessary incident, to the beneficial ownership." I entirely agree with those observations of the Vice-Chancellor. I quite agree that if a man makes a devise of property to *A.* for life, and afterwards to another person, then it is quite clear he is only dealing with that which is his own both in law and in equity. That was the true ground of my decision in *Martin* v. *Laverton* (1). There the testatrix devised and bequeathed all the residue of her property, of whatever description, which she had power to dispose of. The testatrix was mortgagee in fee of an estate which was subsequently sold under a power in the mortgage deed, and I decided that the legal estate in the mortgaged property descended to the heir-at-law. In that case I said that in *Lord Braybroke* v. *Inskip* (2) it was laid down that the rule always now is, that a general devise will pass the legal estate in mortgage or trust estates, provided the trusts or objects of the trusts are not inconsistent with their passing. The Master of the Rolls said in *In re Packman and Moss* (3) that the observation of Lord *Eldon* in *Lord Braybroke* v. *Inskip*, that "the rule is not that in every case where general words are used the property shall or shall not pass, but that in each case you must look at every part of the will for the intention with regard to such property," could not have been present to my mind; but with deference to

(1) Law Rep. 9 Eq. 563. (2) 8 Ves. 417.
(3) 1 Ch. D. 214.

the Master of the Rolls, I think he overlooked the subsequent sentence which I had seen, namely, this, "that trust estates will pass under a general devise, unless it can be collected from expressions in the will, or the purposes or objects of the testator, that he did not mean them to pass."

I still adhere to what I said in *Martin* v. *Laverton* (1); and I have no hesitation in deciding that where there is a general devise of real estate charged with debts and legacies, the legal estate in trust property will pass under that devise, notwithstanding the charge, which attaches only on property which the testator is competent to charge with his debts and legacies.

In this case there can be no inconvenience whatever in holding that the legal estate passed, and there is no reason why it should not pass. The testator gives all his property which is not under settlement as follows:—[The Vice-Chancellor read the words of the gift]; then he gives various pecuniary legacies, and he gives the rest and residue of his unsettled property to his great-nephew, *J. E. Anderdon.* The property now in question is unsettled property. It is his in a Court of Law, but not in a Court of Equity. I decide that that which is his in law will pass, and that the legal estate in this trust property passed under the words of his will.

Solicitors: *Reed & Lovell*, agents for *Reed & Cook, Bridgwater; Merediths, Roberts, & Mills*, agents for *Sibly, Bristol.*

(1) Law Rep. 9 Eq. 563.

V.-C. M.
1876
June 16.

In re TUFNELL.

[1876 T. 71.]

Officer in the Army—Tenure of Office—Liability to Dismissal—Permanent Appointment—Mutiny Act.

14 Ch D. 314

Every officer in Her Majesty's army holds his office subject to the will of the Crown, and is liable to be dismissed at any moment without cause assigned; and there is no such thing as a military appointment permanent in the sense of being tenable for life, or until the holder is disqualified by misconduct or incapacity from fulfilling the duties attached to it. Therefore where a medical officer in the army was at his request, and on condition of waiving his right to promotion, appointed to the permanent medical charge of the military prison at *Dublin*:—

Held, 1, that as a military officer he was subject to the rules and regulations of the service, and the Court had no jurisdiction on a petition of right or any other proceeding to inquire into the circumstances under which he ceased to hold the office; 2, that the office, like all others in the army, was only tenable *durante bene placito*.

Statement.

DEMURRER.

This was a petition of right by *Thomas Jolliffe Tufnell*, who now held the rank of surgeon-major in Her Majesty's army.

The petition stated that the suppliant entered Her Majesty's army on the 11th of June, 1841, and in the month of April, 1846, he was stationed at *Dublin* as assistant-surgeon on the staff, and was in charge of the then existing provost prison.

Shortly afterwards the new district military prison at *Dublin* was completed, and with a view to obtaining the permanent medical appointment to the prison, he put himself in communication with the then Secretary at War, who was the person to make a permanent medical appointment, and with that view, on the 5th of October, 1846, wrote and sent to Captain *Dillon*, the Superintendent of Military Prisons in *Ireland*, a letter, which was in substance as follows:—

"With reference to my application for permanent appointment to the military provost prison, I have the honour to inform you that with a view of obviating any difficulty that may arise in naming me to permanent employ, that should the Right Honour-

able the Secretary at War and the Director-General of the Army Medical Department be pleased to confirm my present employment in *Dublin*, I have no objection to forego all further claims to promotion regarding a permanent appointment as equivalent to increased rank."

He received in answer the following from the Under Secretary at War:—

"War Office,
"31 Oct., 1846.

"Sir,—I am directed to acknowledge the receipt of your letter of the 5th instant, transmitted by the Superintendent of Military Prisons in *Ireland*, and to acquaint you that, under the circumstances represented by the military authorities at *Dublin*, the Secretary at War, as a special case, will not object to your taking permanent charge of the military prison at *Dublin*, on the understanding that you are to continue to perform the same duties as heretofore to the troops at *Dublin*, and that you also forego all future claim to promotion as a medical officer of the army.

"I am, Sir,
"Your very obedient servant,
"*L. Sulivan.*

"Assistant-Surgeon *Tufnell*,
"Military Prison, *Dublin*."

Mr. *Tufnell* accepted the terms mentioned in this letter, and on the same day entered upon the duties of medical officer, which he continued to discharge till the 8th of December, 1874, when he was compulsorily retired on half-pay. He was then in the 56th year of his age, and was then and now competent and able to perform the duties attached to the permanent medical charge of the military prison at *Dublin*, and was then and still was willing to perform them; and he submitted that under the letter of the 31st of October, 1846, he was appointed to the medical charge of the military prison at *Dublin* during his life, or until incapacitated by infirmity or misconduct.

The petition then detailed the circumstances relating to the suppliant's appointment to the office of Regius Professor of Military Surgery at *Dublin*, to which he was appointed in August, 1855, with a salary of £100 a year, and the privilege of charging a fee

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of £3 3*s.* to each student not in the service. From this office he derived an income of £250 per annum.

Statement.

This office was afterwards abolished upon the concentration of the military medical schools at *Chatham*, and by way of compensation for its loss he received the rank of surgeon-supernumerary to the establishment, and by warrant of the 11th of June, 1861, he was advanced to the rank of surgeon-major.

Mr. *Tufnell* submitted that this promotion was as supernumerary to the establishment, and as such, a special appointment; and though different in kind from, yet was equal in duration with, the appointment for which it was substituted, and was therefore tenable by him for life, or whilst capable of performing the duties.

The retirement on half-pay was made after notice to him from the Commander-in-Chief.

The petition stated further that between March, 1867, and December, 1874, at least twenty-three medical officers junior to Mr. *Tufnell* were promoted over his head to the grade or rank of deputy-inspector-general, and it was submitted that the only ground upon which he had been passed over (except in the case of promotion for special services) was that he held a special appointment which was permanent and supernumerary.

The prayer was, that Her Majesty might do what was just and right, and cause the suppliant to be compensated and indemnified for the loss, damage, or injury sustained by him; and for further relief.

It was not stated in the petition, and it did not appear, that any emoluments were attached to the office beyond the pay belonging to the rank of the officer holding it. But it was stated in the course of the arguments that in 1846, when the appointment was made, Mr. *Tufnell* was to receive 15*s.* a day; that just before he was put on half-pay his emoluments were £680, and his half-pay £365.

The Attorney-General demurred.

Argument.

Rigby, in support of the demurrer:—

This is a demurrer under the Act of 23 & 24 Vict. c. 34, 4 commonly known as Sir *William Bovill's* Act, under which a petition of right follows the same course as any other action or suit.

The first ground of demurrer is that this is an attempt to bring within the cognizance of Courts of Law the relation between Her Majesty and the officers of Her Majesty's army. The Court has no jurisdiction to entertain any question arising as to the pay or half-pay of any officer in the army. Every military officer holds his office at the will and pleasure of the Crown in the strict sense of the word, and there is no contract as between an officer and the Crown to hold office for life. It goes some way to support this view that no case has as yet arisen in which such a claim as the present has been made by any military officer.

The allegations amount, in substance, to stating that an appointment to a permanent office means an appointment for life. Now it is perfectly clear that, under the provisions of the *Mutiny Act* passed annually, Her Majesty has no power to keep up a standing army or employ a single officer for more than a year, or enter into any such arrangement as that explained in the submissions in this petition.

The *Mutiny Act* commences with this recital: "Whereas the raising or keeping a standing army within the United Kingdom of *Great Britain* and *Ireland*, in time of peace, unless it be with the consent of Parliament, is against law;" and by sect. 2 of the *Mutiny Act* of 1875 it is made to apply to all persons receiving pay as members of the permanent staff of a militia regiment, and amongst other specified persons, to all men enrolled in the reserve force when called out for active training, or when kept on duty, having volunteered their services, or when called out in aid of the civil power, or when called out on permanent service under Her Majesty's proclamation. Now, so far as the letters set out in the petition of right make a contract, there are no emoluments attached to the office to which Mr. *Tufnell* was appointed. To ascertain what the emoluments were, the Queen's Regulations must be looked at, and there is nothing to shew that the half-pay now received by him does not exceed the whole emoluments to which he was entitled under the permanent appointment. And if he receives his pay under the Queen's Regulations he holds his office upon the terms upon which all the offices in the army are held, that is to say, at the goodwill and pleasure of the Crown.

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Even staff appointments, to which officers are appointed for five years, are held subject to the same regulations.

[MALINS, V.C. :—Nearly all appointments are held on the same tenure. Judges formerly so held their appointments, though now these offices are held permanently, in the sense that the occupants cannot be removed except upon an address of both Houses of Parliament.]

There is not much in the nature of authority on this subject, and so far as appears, no direct claim of this kind has ever been made, but where questions of this kind have come before the Court indirectly, an officer in the army has been invariably held to hold his office subject to the will of the Crown. Such a case is *Gibson* v. *East India Company* (1), in which the point decided was that the retiring pension of a medical officer in the *East India Company* did not pass to his assignees in bankruptcy. Lord Chief Justice *Tindal*, in that case, touches on the relations between Her Majesty and the officers in the army, and grounds his decision upon the principle that no action could be supported against any one to recover the arrears of half-pay. And sect. 7 of Sir *W. Bovill's* Act expressly provided that the Act shall not create rights where they did not previously exist.

It is possible that public money may be so received by a public officer that he may be regarded as a trustee and liable to an action for money had and received, as in *Gidley* v. *Lord Palmerston* (2). But except in that way, on a petition of right as distinguished from a petition of grace, there is no redress.

Then there is the case of *Re Poe* (3), which was an application for a prohibition to issue to a court-martial, and the application was refused on the express ground that the power of dismissal might have been lawfully exercised even without any court-martial.

The two grounds on which the case rests are, first, that every officer holds his post absolutely at the pleasure of Her Majesty; and, secondly, that under the *Mutiny Act*, there is no power to constitute or to appoint a person to any office which is permanent

(1) 5 Bing. N. C. 262. (2) 3 Brod. & B. 275.
(3) 5 B. & Ad. 681.

in the sense of being tenable for life, or subject to be vacated only in case of misconduct or incapacity. The petition, moreover, does not make out any case of real hardship.

Argument.

Fry, Q.C., *Locock Webb*, Q.C., and *E. U. Bullen*, in support of the petition:—

It may be quite true that with regard to officers simply serving in the army they hold their appointments merely in accordance with the good pleasure of the Crown, the army being, under the *Mutiny Act*, a merely temporary establishment existing from year to year. But these conditions do not apply to the case of officers of military prisons, where there are prisoners undergoing sentences extending beyond the duration of the *Mutiny Act*. It cannot be pretended that every office of this kind must be vacated every year, and if not, there must be such a thing as an office tenable permanently.

Assuming this to be a permanent in the sense of a life appointment, there is a clear case of hardship.

When appointed, the suppliant was entitled to certain emoluments. By long service these emoluments had increased; and then, even assuming that the half-pay he now receives on retirement is equal to his original full pay, he is clearly wronged by the reduction. The addition to his original pay arose from the abolition of an office to the emoluments of which he was also entitled.

An appointment like the present is entirely different in form from that of a commission to an officer in the army, which would simply describe the office without saying anything about its duration. Here the suppliant was expressly appointed to a permanent office in consideration of his waiving his claims to promotion in the ordinary way.

Now there are really two points only to be considered. First, whether the Secretary at War had power on behalf of the Crown to appoint the suppliant to an office for any duration beyond Her Majesty's will and pleasure; and, secondly, whether he exercised it by entering into such a contract. Now, at the date of the appointment the *Mutiny Act* in force was that of 9 & 10 Vict. c. 11, and by the 28th section, which is repeated in every subsequent Act, it was provided that it should be lawful for the Secre-

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tary at War to set apart any building then erected, or which might thereafter be erected, or any part or parts thereof, as military prisons, and to declare that any such building, or any two or more separate and detached buildings, should be, and thenceforth such building or buildings should be deemed and taken to be a military prison; and that every military prison, whether the same then existed or might thereafter be established, which should be, or which, under the provisions of any former Act of Parliament, had been so set apart or declared, should be deemed to be a public prison within the meaning of that Act. A prison, therefore, is a permanent establishment, and is not created merely *de anno in annum*. But the section goes on as follows: "And all and every the powers and authorities with respect to county gaols or houses of correction which now are, or which may hereafter be, vested in any of Her Majesty's Principal Secretaries of State shall, with respect to all such military prisons, belong to and may be exercised by the Secretary at War." That, in fact, removes them from the authority of the Home Secretary to that of the Secretary at War, and gives a similar authority to the latter in respect to military prisons which the former had with respect to civil prisons. Then it goes on, "And it shall be lawful for the Secretary at War from time to time to make, alter, and repeal rules and regulations for the government and superintendence of any such military prison, and of the governor, provost-marshal, officers, and servants thereof, and of offenders confined therein; and it shall be lawful for the Secretary at War from time to time to appoint an inspector general and inspectors of military prisons, and a governor or provost-marshal, and all other necessary officers and servants for any such military prison; and, as occasion may arise, to remove the governor or provost-marshal, officer, or servant of any such military prison, and the general or officer commanding any district or foreign station within which may be any such military prison, or such general or other officer, and such other person or persons as the Secretary at War may from time to time appoint, shall be a visitor or visitors of such prison."

The scheme of this enactment is to constitute certain buildings permanent military prisons, and to give the Secretary at War the same power with reference to appointing officers in and about

them which the Home Secretary has with respect to civil prisons. He has a general power to appoint officers, and it can hardly be said that he can merely appoint them *durante bene placito.* It surely authorizes him to enter into a contract with them for a week, or a month, or a year, or for life. It gives him, in fact, power to appoint permanent officers to a permanent institution. Such appointments are entirely distinct from such as take effect under a commission from the Crown. And without such a power he could not have appointed even a turnkey for a week.

Now there is an authority as to the distinction between an appointment *durante bene placito* and an appointment generally. It is that of *Dighton's Case* (1). It was an application to be restored to the office of Town Clerk of *Stratford-on-Avon,* and the Court could not help the applicant because the corporation had only power by their charter to appoint a clerk *durante bene placito;* but it was held that if the letters patent had been to appoint generally, that would have justified an appointment for life; and the Court were so averse to the idea of an appointment *durante bene placito,* that they hinted at the desirability of issuing a new charter to get rid of the anomaly.

Then the next question is, whether, assuming that the Secretary at War had power to appoint for life, he exercised that power. The letter of the 31st of October, 1846, indicates that the appointment was a special and peculiar one for the permanent medical charge of the prison. For if not, a permanent appointment means one from which the person appointed might be dismissed the very next day. There is no meaning to be put upon the word "permanent" which would make it less extensive than that part of the life of the appointee during which he was able and willing to perform the duties of the office. It stands here admitted, upon this demurrer, that the suppliant is only fifty-six years of age, and that he is able and willing to perform the duties of this office, to which he was appointed upon a specific understanding, which it is not now alleged that he has departed from.

As regards the authorities cited, it is only necessary to refer to *Gibson* v. *East India Company* (2). It has no application to the present case. It was not a question as to the nature of appoint-

(1) 1 Vent. 82. (2) 5 Bing. N. C. 262.

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ments under the Crown. It was the case of a corporation which could only make a contract under its common seal, and there was no contract there under the common seal. The question was whether that particular contract came within the class as to which the seal of the corporation was not required.

In re Poe (1) shews merely, what is entirely undisputed, that officers of the army and navy have no right by way of grant by virtue of their commissions. But this is a case depending upon the express grant of a permanent appointment to a special office.

Judgment.

MALINS, V.C.:—

I am sorry to be obliged to come to the conclusion that the case is entirely against Mr. *Tufnell*. This is a petition of right claiming compensation against the Crown, not for dismissal from any office, but for removal in this sense, that instead of continuing to hold the office he has been put on half-pay. He complains of having been put upon half-pay at the age of fifty-six when still fully able to continue to perform the duties of his office, the emoluments of which would have been greater if he had risen with other officers than the half-pay which he receives.

Now, before I advert to the very important questions which have been raised upon this petition of right, I think, first of all, one ought to see whether there is any grievance of which Mr. *Tufnell* has any just reason to complain. What he complains of is, that in 1846 he received from the Crown the permanent appointment of medical charge of the military prison at *Dublin*, on the understanding that he was to continue to perform the same duties and forego all future claim to promotion as a medical officer in the army.

Now it appears by the statement in the petition of right that in the year 1841 Mr. *Tufnell* became assistant-surgeon in the army, and was on the staff stationed in the city of *Dublin* as assistant-surgeon in charge of the existing provost prison. Shortly afterwards, for reasons which have not been explained, but which one can very well understand, Mr. *Tufnell* preferred what he called a permanent appointment at a fixed station, rather than being liable to be ordered about the world as all military men, whether combatant

(1) 5 B. & Ad. 681.

officers or medical officers, are liable to be. [His Lordship then read the letters above set forth, and continued:—]

Now there is no allegation in this petition of right that the emoluments which he receives upon his retirement on half-pay are less than those of the appointment which he says was a permanent one under the letter of the 31st of October, 1846, and if by any arrangement with the Government he gets as much now as he would have got by retaining the appointment which was conferred upon him on the 31st of October, 1846, there is no grievance of which he has any reason to complain, and upon that ground alone I think the petition of right fails.

But I intend to decide the case on far higher grounds than those. The *Mutiny Act* which was in force in 1846 was the 9 & 10 Vict. c. 11; by the 28th section, as usual, the Secretary at War is authorized to set apart buildings as military prisons, and to make rules and regulations for the government of the same. [His Lordship then read sect. 28, and continued:—]

It is argued that this enactment confers upon the Secretary of State power to appoint medical officers for life. I am clearly of opinion that it confers no such power, and that it only enables him to select the proper officers for the management of the prison, and those officers, when selected, are, like all other officers in the naval and military service, liable to the rules of that service, and removeable at the will and pleasure of the Sovereign. It would be a most injurious thing to the public service if the Crown had not the power, which we know it has and exercises constantly, of saying to any naval or military officer misconducting himself, whether in his military or naval, or in his private capacity, simply by notice in the *Gazette*, that the Crown has no longer occasion for his services. It is an arbitrary power, and one which may be exercised most injuriously to the interests of the officer, but such is the benignity and the conduct of Government and of the Sovereign towards all officers, naval, military, or others, that it is never exercised arbitrarily or improperly, or except on proper occasions, and it is absolutely necessary for the discipline of the army and navy, and for the good conduct of the public service, that such an arbitrary power should exist. Therefore, in whatever situation an officer may be placed, as, for instance, a

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captain, or the senior major of a regiment, expecting every day, on the retirement of the colonel, to have the command of the regiment, he may have another officer summarily appointed over his head, or a stranger brought from another regiment, or he may be summarily removed. My opinion, therefore, is that the power of appointing a military officer under that section only extends to an appointment subject to the rules of the service, and therefore removeable at the will and pleasure of the Crown with or without reason. Still I think it was quite right for the Under-Secretary of State, on behalf of the then Secretary at War, to intimate to Mr. *Tufnell* that which I believe was intended to be and was honourably fulfilled—that the appointment when made was to be of a permanent character; and that so long as the authorities were satisfied with his services they had no intention to remove him, and he would not be removed. He accordingly continued to hold that appointment for a period of no less than twenty-eight years, that is to say, from 1846 to 1874. But in the meantime, although Mr. *Tufnell* had bound himself not to make any claim for promotion, he had been appointed Regius Professor of Surgery, and attached to that, as appears by this petition, he had a salary of £100 per annum, and a fee of three guineas for every pupil not in the service whom he should instruct as Regius Professor. That appointment was in time abolished. He makes that a subject of complaint, and says that he was appointed for life. This view, in my opinion, could not be sustained, but the Government treated the case very fairly, and although they did not give him remuneration, yet, in consideration of all the circumstances, they promoted him to the full rank of surgeon, and afterwards to that of surgeon-major.

Now, then, in 1874, for reasons which I know nothing about, the Crown thinks fit not to remove Mr. *Tufnell*, or to do anything offensive to him, but, treating him as entitled to the half-pay of his rank, which gives him £365 a year, or £1 a day, they require, either because he was then fifty-six years of age or for other reasons, that he should retire on half-pay. He remonstrated. He considered that he had a permanent appointment which he was entitled to retain. However, I have stated my opinion that he was appointed subject to all those rules which affect the officers of the army and

navy, and, as a medical officer, was, like every other officer, liable to be dismissed, to be put on half-pay, to be ordered to retire, or to take any step which the Crown for its convenience may desire, or for the benefit of the public service may think proper to adopt.

Now, with regard to the law, every case cited before me proceeds upon the same principle which was laid down in *Gibson* v. *East India Company* (1). The question there was whether the assignee of an officer of the *East India Company* (who was treated by the Court of Queen's Bench just like an officer in the Queen's service) who had become bankrupt could maintain an action against the *East India Company* for the amount of his half-pay. The Lord Chief Justice *Tindal* in his judgment says this (2): "The resolution, however, is a general regulation affecting the whole of the army, not a separate contract with any individual officer; and although it may differ in some particulars from a grant of half-pay by the Crown to the officers of the army or navy upon their retirement from actual service, yet it bears a much stronger analogy to it in the mode of its being granted and in the consequences attending it than to any contract. Now it is clear that no action could be supported against any one to recover the arrears of half-pay granted by the Crown, at least unless the money has been specifically appropriated by the Government and placed in the hands of the paymaster or agent to the account of the particular officer, and there is no ground upon general principle to hold that an action could be maintained against any one unless under the same circumstances in the present case." The question of law here decided therefore is, that although the Crown may order an officer to retire on half-pay, and prescribe that the half-pay shall be of a certain amount, if the Crown thinks fit to withhold that half-pay, it is absolutely impossible to recover it. Then he continues: "It was indeed strongly argued at the Bar that as the resolution under which the retiring pensions are paid has been sanctioned by the Commissioners for the affairs of *India*, it has by such approval become obligatory on the company and in the nature of a contract, but we think there is no ground for giving such operation to the Act. The object of the statute (33 Geo. 3,

(1) 5 Bing. N. C. 262.

(2) 5 Bing. N. C. 273, 274.

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c. 53) was that of creating a board of commissioners to superintend, direct, and control the acts, operations and concerns, relating to the civil and military government or revenues of the Company's territories and acquisitions in the *East Indies*, to make the approval of the board essential before instructions are sent out, but not to give additional force or legal obligation to the resolution itself beyond that which it originally possessed." Then he puts the whole subject-matter upon this: "The grant in question" —that is, the grant of half-pay—"therefore appears to us to range itself under that class of obligations which is described by jurists as imperfect obligations; obligations which want the *vinculum juris*, although binding in moral equity and conscience to be a grant which the *East India Company*, as governors, are bound in *foro conscientiæ* to make good, but of which the performance is to be sought for by petition, memorial, or remonstrance, not by action in a court of law." So I say here. This obligation wants the *vinculum juris*, though it may be an obligation *in foro conscientiæ*, a moral obligation which ought to be imposed, but it cannot be enforced in any Court of Law.

The same principle follows from what was decided in the case of *Gidley* v. *Lord Palmerston* (1). That was a much earlier case. There it was held that money could not be recovered, even when it had been paid into the hands of the Secretary of State for the purpose of paying the half-pay and appropriated to that particular object. So nothing can be more clear than that, now that Mr. *Tufnell* is retained on half-pay, if the Crown thinks fit to withhold the half-pay, he has no remedy whatever, but is entirely at the mercy of the Crown, and by no petition of right or any other proceeding can he enforce the payment even of his half-pay. The case of *In re Poe* (2) proceeds upon the same principle. It decides that a prohibition cannot issue to a court-martial after its sentence has been ratified by the Queen and carried into execution. There is a litigation in which Colonel *Dawkins* complains that when, upon the eve of succeeding to the command of a battalion of the Guards, he was summarily, and without reason, and, as he contends, for improper reason, put on half-pay. He has been litigating the question in every Court, and at last carried it to the House of

(1) 3 Brod. & B. 275. (2) 5 B. & Ad. 681.

Lords, where it was finally decided against him. That litigation has resulted in shewing most clearly that every officer in the army is subject to the will of the Crown, and can be removed and put on half-pay, or dealt with as the Crown, with a view to the public convenience, thinks best. It is a power which is always considered to lie in the Crown, a rule which has never been departed from, and therefore, on general principles, I come to the conclusion that Mr. *Tufnell* has no ground whatever to complain. He ought to bear in mind that during the last thirty-five years he has been an officer of the British army, and, as such, subject to the will and pleasure of the Crown, which will retain or remove him as it thinks fit.

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I am therefore of opinion that the demurrer must be allowed, with costs if asked for.

Solicitors: *Perkins & Weston; Davies, Campbell, Reeves, & Hooper.*

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[1876 H. 112.]

V.-C. M. 1876 *June* 22.

Consent Order—Motion to discharge—Inadvertence.

A consent given by counsel in the presence and with the sanction of his client may be withdrawn before the order is drawn up, if given through inadvertence, but not so where the matter was fully understood at the time and the client shortly afterwards changes his mind.

THIS was an application by the Defendant, *George R. Jesse*, that an order made on the 18th of May last by consent should not be treated as a consent order, but be now discharged in order that the whole matter might be reheard upon its merits.

Statement.

The Plaintiffs in the action were the committee and members of the *Society for the Abolition of Vivisection*, which was founded in the year 1875. The Defendant was appointed honorary secretary of the society at its formation, and continued so up to the 24th of February, 1876. The statement of claim was to the following effect: Sums of money exceeding £2000 had been subscribed by various persons in aid of the society, which had been paid into the *National*

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and Provincial Bank of England to the credit of the society. On the 3rd of February the Plaintiffs wrote to the Defendant requesting him to call a meeting of the committee, but the Defendant took no notice of such letter. On the 17th of February a meeting of the committee was summoned, and the Defendant was required to attend the meeting and produce thereat all accounts, vouchers, and books belonging to the society, and to furnish the committee with an account of his receipts and payments on behalf of the society. The meeting so convened was duly held on the 24th of February, 1876, but the Defendant did not attend it, nor did he produce the accounts, vouchers, and books required. At that meeting it was resolved by the committee that the Defendant be removed from the office of honorary secretary, and that he be desired not to receive or expend any more moneys on behalf of the society. A copy of this resolution was forwarded to the Defendant, together with a letter requesting him to furnish the committee with an account of his receipts and payments, but the Defendant had taken no notice of the communication, and since the date thereof he had continued to insert advertisements in newspapers respecting the society, and had continued to receive and expend moneys as on behalf of the society, and otherwise to hold himself out as the honorary secretary and agent of the society.

The claim against the Defendant was that an account might be taken of his dealings and transactions in respect of the matters aforesaid, and that he might be restrained from causing himself to be advertised as the honorary secretary or agent of the society, and from collecting or receiving moneys belonging to the society, and from all further interference with the moneys belonging to or subscribed for the society, and that if necessary a receiver might be appointed.

The action came on for hearing upon motion on the 18th of May, 1876, when the following order was taken by consent:—"That the Defendant by his counsel submitting to account for all moneys received by him, or by any person or persons on his behalf, for the *Society for the Abolition of Vivisection*, a balance-sheet be prepared of all receipts and payments on behalf of the society, and such balance-sheet be printed and circulated among the subscribers to the society, and that a general meeting of the subscribers be called

for the appointment of a committee and officers of the society, such meeting to be called with the sanction of the present committee, and the advertisements and circulars relating to such meeting to have attached to them the name of the Defendant as honorary secretary to the society. And it was further ordered that Messrs. *Frere, Forster, & Frere,* the solicitors of the Defendant, should in the meantime retain in their hands the sum of £1418 11*s.* 2*d.*, admitted by the Defendant to be subscriptions of the said society under his control. And it was ordered that the costs of this action be paid by the said Messrs. *Frere, Forster, & Frere* out of the said sum, and that the balance thereof remaining after the payment of such costs be paid by the said Messrs. *Frere, Forster, & Frere* to the person or persons who should at the said meeting be appointed to receive the same."

Statement.

When this order was taken the Defendant was represented by counsel, who was instructed by solicitors who were present in Court, and the Defendant was also present. It now appeared that immediately upon leaving Court the Defendant had objected to the terms of the order, and had informed his solicitors of his objection; that his solicitors had the same day communicated with the Plaintiffs' solicitors, and stated to them that the Defendant declined to consent to the order.

The present application was made upon the ground that the counsel and solicitors who appeared for the Defendant had misapprehended and mistaken their instructions, and were not authorised to give their consent to the terms of the order.

Argument.

Higgins, Q.C., and *Kekewich,* for the Defendant *Jesse* :—

The rule of this Court is that if a counsel or solicitor consents to any order on behalf of his client, and that consent has been given under a mistake or misapprehension, the client may withdraw his consent at any time before the order is drawn up. In this case it appears that Mr. *Jesse* had not assented to the terms of the order. It is true he was in Court at the time, but he did not understand the full effect of the order which was taken by consent, and immediately upon leaving Court he made his objection to the terms of that order.

This rule is laid down in clear terms by the Master of the Rolls

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in *Bathurst* v. *Stanley* (1), where his Lordship says: "There has been a misunderstanding on both sides. Counsel giving up something by mistake may always stop it before the decree or judgment is drawn up. It was a concession made under a misapprehension. Counsel intending to concede one thing conceded another. Before the decree or judgment is drawn up you are entitled to say, 'That is not what I intended to consent to.' The most formal consent may be actually withdrawn before the decree is drawn up, even if no mistake has been made." The same principle was laid down in the well-known case of *Swinfen* v. *Swinfen* (2). When this order was made the Registrar refused to draw it up without the consent of the Defendant, and under the circumstances the right course is that the case should be reheard.

[They also cited *Furnival* v. *Bogle* (3).]

Glasse, Q.C., and *Bardswell*, for the Plaintiffs:—

There was no mistake or misunderstanding in this case. All the parties perfectly well knew what the order was, and the facts upon which it was made. The order was taken at the sitting of the Court, and it was not till late in the day that the Defendant's objection was communicated to the Plaintiffs' solicitors. If there had really been a misapprehension it should have been at once notified to the Court. The client is always bound by the consent given by his counsel, in whom a discretion is vested. That was laid down in *Straus* v. *Francis* (4), where it was held to be within the general authority of counsel to consent to the withdrawal of a juror, and to a compromise of an action, notwithstanding that his client might have dissented, unless his dissent was brought to the knowledge of the opposite party at the time. The case of *Rumsey* v. *King* (5) was decided upon the same principle.

Higgins, in reply:—

In *Rumsey* v. *King* a month had elapsed before intimation was given of the client's dissent, and by upsetting the order it would have involved an order made in another suit. And in *Straus* v.

(1) Sol. J. 1876, p. 542; also cited from the shorthand notes.
(2) 2 De G. & J. 381, 4 Jur. N.S. 774.
(3) 4 Russ. 142.
(4) Law Rep. 1 Q. B. 379.
(5) 33 L. T. (N.S.) 728.

Francis (1) the action had been partly heard, and witnesses examined, and this would have involved a new trial, and great expenses might have been incurred. Here nothing has been done, and no inconvenience can arise. A client can only be bound so far as he has given his consent.

MALINS, V.C.:— Judgment.

When the motion came on for hearing on the 18th of May, Mr. *Jesse* had the advantage of being represented by Mr. *Kekewich*, a counsel of high standing and ability, and by Messrs. *Frere, Forster, & Frere*, solicitors of great experience, and also of high standing. The matter was an exceedingly simple one. It was a matter which to read and thoroughly comprehend did not require the attention of any experienced solicitor or counsel for more than a quarter of an hour. When the motion came forward I remember perfectly well Mr. *Glasse* rising and telling me the object of the motion. It was then suggested that the order which is now sought to be discharged should be made, and it was made, in the presence of and with the sanction of Messrs. *Frere & Co.*, the solicitors, and of Mr. *Kekewich*, the counsel of the Defendant, and in the presence of Mr. *Jesse* himself.

Under those circumstances, the order was treated as a consent order. In the course of the same day it seems that Mr. *Jesse* altered his mind, for I must come to the conclusion that it was not in Court, but after he had left the Court, that he changed his mind, and I rather collect from this statement of claim that Mr. *Jesse* is a gentleman who very much likes to have his own way. Here is an honorary secretary of a society who will not call meetings when the society desires to have them called, who will issue advertisements when the society desires they should not be issued, and when he is asked to attend the meetings of the society he does not attend them; all these things shew plainly that he is determined in all things to have his own way. If all these statements are proved, he was as wrong as a man can be, and he was bound at the earliest possible moment to set himself right; he was bound, therefore, if he had issued advertisements which the governing body did not desire to have issued, to abstain from the issuing of them; he

(1) Law Rep. 1 Q. B. 379.

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was bound to obey the directions of the governing body, and was bound to act in a manner totally different from that in which it is obvious he had been acting. His counsel and his solicitors, therefore, took a sound view of his case, and he himself in Court took a sound view of his case, and he cannot be allowed to set everybody at naught when he comes to this Court. By the advice of his counsel, by his own deliberate intention and consent, he submitted to a decree which was a favourable decree to him; because all that it did after stating the affidavits which were read was what no reasonable human being could object to; for it is a decree made in concession to Mr. *Jesse*. I well remember that Mr. *Jesse* was very anxious, and it was so stated in his own presence, that nothing should be done which should give the appearance of an affront to him, and, therefore, that although advertisements were to be issued to call new meetings, it was a concession made to Mr. *Jesse*, that in the advertisements which were to be issued, his name was to be appended as honorary secretary of this society. What, then, was the order to which he submitted? It was this, "The Defendant, by his counsel, submitting to account"—and can any honorary secretary tell me that he ought not to submit to account when the body for whom he was honorary secretary desired him to account—"submitting to account for all moneys received by him, or by any person or persons on his behalf, for the *Society for the Abolition of Vivisection*." [His Lordship read the terms of the order.]

Now, I can only say that this is an order which, if Mr. *Jesse* did not consent to, he ought to have consented to most cheerfully and thankfully; but I am satisfied that he did consent to it. He was present in Court and thoroughly understood it, and he is not, in my opinion, at liberty to withdraw the consent then given. But as much has been said in the course of the argument, and authorities have been cited about the general principles of the Court in withdrawing consents given to orders, I beg to express my opinion, which I believe is in conformity with all the cases that have been cited, that if it shall turn out that by the inadvertence of counsel, by the careless consent of the Plaintiff or Defendant himself, not fully knowing or considering what he is about, an order given by consent has prejudiced him in a manner which neither he nor his advisers could have anticipated at the time, such

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as in the case of *Swinfen* v. *Swinfen* (1), where counsel was instructed to do one thing and consented to a totally different thing; that is, for instance, being instructed to make a claim to an estate in fee simple, he consented that the claimant should have a life estate only, or a tenancy for life; that is entirely beyond his authority, and nothing could be more reasonable than that his client should not be bound by such a consent inadvertently given. So, in the case of *Furnival* v. *Bogle* (2), which has been cited, Lord *Lyndhurst* expressly puts it on grounds with which I should most heartily concur, and which I should never hesitate for one moment to act upon, in this way:—"Mr. *Furnival* supposed that, on his application, stating that counsel were not authorized to consent to the order, the Court would suffer the subject to be again gone into; and he therefore did not, on the former occasion introduce all the circumstances which, it now appears, he might have brought forward. If it had been then shewn that counsel, when they exercised their discretion, had not those materials before them on which a correct judgment might be formed, the decision of the Court might have been different. It is stated that there is now evidence on affidavit which establishes, or goes far to establish, that point. I therefore think myself bound to suspend the drawing up of the order, till the case can be considered in the new form in which Mr. *Furnival* wishes to present it to the Court; and I do so with the less reluctance, because no inconvenience can arise to the other party from this short delay." The cases which have been cited in the Court of Queen's Bench of *Straus* v. *Francis* (3) and *Rumsey* v. *King* (4) are cases undoubtedly carrying this doctrine of a client being bound by the consent of his counsel to a very great length. I do not pretend to say to a greater length than is proper, but certainly to the full length to which it can be carried. The client being present, and having full opportunity of knowing what was done, not objecting at the time, it was held that he could not object to those acts to which his counsel agreed. Therefore, I entirely concur with what the Master of the Rolls has said in the passage which Mr. *Kekewich* has pressed upon me, and I also would desire to say this, that where

(1) 2 De G. & J. 381. (3) Law Rep. 1 Q. B. 379.
(2) 4 Russ. 142, 147. (4) 33 L. T. (N.S.) 728.

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there has been a misapprehension on the part of counsel, where the case has been complicated or difficult, where either the materials have not been sufficiently before the counsel, or being before him, he does not fully comprehend them, or may be excused for not having comprehended them, and consent has been given prejudicial to the client, I should entirely agree with the observation of the Master of the Rolls: "If the counsel says, I made a concession under a misapprehension, it never has been, and I trust it never will be, the course of the Court to bind the counsel to that mistake." I say precisely the same thing in precisely the same terms, that if consent has been given under a misapprehension, or from a misstatement, or want of materials, and if all the information which counsel ought to have when he gives a consent is not before him, it never has been the rule of this Court, and I also trust it never will be the rule of this Court, that the unfortunate client should be bound by such misapprehension. But here, where the whole facts are stated in a page and a half, where the counsel who ask me to decide this do not pretend to say that they were not in possession of every material fact which was necessary to their consent in the case, and the solicitors do the same, and the Defendant himself was in the same position, I think if I were to accede to this application it would be a general license to parties to come to this Court and deliberately to give their consent, and afterwards at their will and pleasure come and undo what they did inside the Court, because on a future day they find they do not like it. It appears to me that this application is altogether groundless and unjustifiable, and I dismiss it with costs.

Glasse, Q.C.:—We do not ask for costs, my Lord.

MALINS, V.C.:—In that case the application will be refused, but, with the consent of the Plaintiffs, without costs.

Solicitors for Plaintiffs: *Nisbet, Rooke, & Daw.*
Solicitors for Defendant: *Frere, Forster, & Frere.*

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June 26, 27.

[1871 H. 90.]

Will—Construction—Mortmain Act—Interest in Land—Debenture of Waterworks Company.

A debenture of a waterworks company, in the form provided by Sched. C. to the *Companies Clauses Act*, 1845, by which the undertaking, including the town rates, was charged with the repayment of the sum advanced :—*Held*, not to be an interest in land within the *Mortmain Act*.

FURTHER CONSIDERATION.

Daniel Holy, by his will, dated the 23rd of September, 1869, after certain recitals shewing that certain property derived by him from his brother was charged with certain annuities, devised his real estate to his sister *Caroline Davenport*, her heirs and assigns, for ever, and made her certain specific gifts, and after making certain other dispositions, bequeathed the residue of his personal estate to the Plaintiffs upon trust to convert and get in the same; and he declared that the trustees or trustee for the time being of the first part of his will should hold the moneys which should arise from the conversion into money of such part of his personal estate thereinbefore bequeathed as might not by law be applicable for charitable purposes, subject to certain charges thereon, upon trust thereout, in exoneration of all his other property both real and personal, to pay the costs of and incident to the conversion into money of all his personal estate, and his just debts, funeral and testamentary expenses, and subject thereto as aforesaid, upon trust for his sister *Caroline Davenport* absolutely.

The testator then directed that the trustees or trustee for the time being of the first part of his will should hold the moneys which should arise from such part of his estate as might by law be given by will for charitable purposes, upon trust for investment as therein mentioned, and for payment thereout of certain legacies and annuities, with an ultimate trust to pay and transfer the trust fund "to the burgesses or free tenants and trustees of certain messuages and hereditaments vested in them for charitable pur-

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poses within the town of *Sheffield*, commonly called the *Sheffield* Town Trustees." The testator made five codicils to his will, to which it is unnecessary to refer.

The testator died on the 31st of December, 1870, and the suit was instituted to administer his estate.

Part of the property applicable to the trusts of the will consisted of £2275, invested on the security of a mortgage debenture of the *Sheffield Waterworks Company*, dated the 21st of December, 1865. It was in the ordinary form given in Sched. C. to the *Companies Clauses Consolidation Act*, 1845, and the company of proprietors of the *Sheffield Waterworks* thereby purported to assign the undertaking called the *Sheffield Waterworks*, and all future calls on shareholders, and all the rents, rates, and sums of money arising by virtue of the several Acts relating thereto, and all the estate, right, title, and interest of the company in and to the same until the sum of £2275, together with interest for the same at the rate of £5 per cent., should be fully paid and satisfied, and the time of repayment was stated to be the 21st of June, 1868, which, by a memorandum indorsed on the debenture, was extended to the 21st of June, 1871.

The question was, whether this debenture passed to the *Sheffield* Town Trustees, or was an interest in land within the provisions of the Mortmain Acts, and must, therefore, be treated as part of the property not applicable to charitable purposes.

Argument.

Miller, Q.C., and *Chapman Barber*, for the Plaintiffs:—

It has been expressly decided on several occasions that a debenture is such a security as must be considered to confer an interest in land, and therefore is within the *Mortmain Act*. One of the most recent cases seems to be *In re Langham's Trusts* (1), where the distinction was drawn between shares and debentures. It was followed by *Thornton* v. *Kempson* (2). But the same point had been already decided in an earlier case of *Ashton* v. *Lord Langdale* (3).

G. Cary, for an annuitant under the will, took the same view.

(1) 10 Hare, 446. (2) Kay, 592.
(3) 4 De G. & Sm. 402.

Glasse, Q.C., and *Bunting*, for the *Sheffield* Town Trustees:—

It must be admitted that the authorities on this subject are conflicting. But this arose from the fact that the nature of debentures was formerly not clearly understood. When it was once made clear that debentures gave no right of entry upon the undertaking, but only to have a receiver of the tolls appointed, and to a charge on the future tolls, it was also manifest that these debentures were not within the *Mortmain Act*. But before this took place the decisions were not all one way, as in *Bunting* v. *Marriott* (1), which was subsequent to *In re Langham's Trusts* (2), and yet a debenture was held not to be within the Act; and *Taylor* v. *Linley* (3), so far as it went, supported the same view. *Myers* v. *Perigal* (4) was an older decision founded on the same principle. But the nature of debentures was not fully explained till *Gardner* v. *London, Chatham, and Dover Railway Company* (5); and it is clear that otherwise the cases cited by the Plaintiffs would have been decided the other way. It may be law, but it is contrary to common sense that there should be a distinction between shares and debentures; and *Ware* v. *Cumberlege* (6), where it was attempted to bring shares in a joint stock company within the *Mortmain Act*, was expressly overruled by *Edwards* v. *Hall* (7). *Thornton* v. *Kempson* (8) does no more than affirm *In re Langham's Trusts*.

Miller, in reply:—

There is a clear distinction between the position of a shareholder in a company and that of the company itself. A shareholder has no right to any specific portion of land, but the company and their assignees, which is the position in which the debenture holders stand, have a right specifically to the land belonging to the company: *Hayter* v. *Tucker* (9). Where the nature of the interest is such that the land can be directly affected, it is within the Act, but not otherwise.

(1) 19 Beav. 163.
(2) 10 Hare, 446.
(3) 2 D. F. & J. 84.
(4) 2 D. M. & G. 599; 16 Sim. 533.
(5) Law Rep. 2 Ch. 201.
(6) 20 Beav. 503.
(7) 6 D. M. & G. 74.
(8) Kay, 592.
(9) 4 K. & J. 243.

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The decision in *Edwards* v. *Hall* (1) did not affect the distinction between shares and debentures. *Thornton* v. *Kempson* (2) is the latest authority precisely in point, because in that case there were both shares and debentures in the company.

Judgment.

June 27. MALINS, V.C.:—

The only point to be decided is whether certain securities on which the property of the testator was invested were or not within the *Mortmain Act.*

The simple effect of the will was to give to the testator's sister all the property which could not be given to charitable objects, and to give to the *Sheffield* Town Trustees that which he could so dispose of. The property as to which the question arises is a mortgage of the *Sheffield Waterworks,* which is in the ordinary form, charging the undertaking and the rates.

It is now clearly settled that the shares in incorporated companies, such as canal companies, railway, gas, and banking companies, though they derive their profits from the use of land, are not within the Mortmain Acts. Sir *John Leach,* in *Tomlinson* v. *Tomlinson* (3), appears to have held in the first instance that canal shares were within the *Mortmain Act,* but *Sparling* v. *Parker* (4), to which *Tomlinson* v. *Tomlinson* was appended as a note, decides the very contrary; and though, as Lord *Langdale* states in *Walker* v. *Milne* (5), *Tomlinson* v. *Tomlinson* was not cited before him in *Sparling* v. *Parker,* he also says that, if he had been aware of it, he did not think it would have led to any different result. And in *Walker* v. *Milne,* where there were not only shares but mortgage bonds by which the rates were assigned, they were both held not to be within the *Mortmain Act.* The same thing was decided by Sir *L. Shadwell* in *Myers* v. *Perigal* (6), where a debenture of a railway company was held not to be within the Act; and though the case was appealed, it was only on the second point, in

(1) 6 D. M. & G. 74.
(2) Kay, 592.
(3) 9 Beav. 459, n.
(4) 9 Beav. 450.
(5) 11 Ibid. 507.
(6) 16 Sim. 533.

which the Vice-Chancellor had held that shares in a bank were within the Act, and Lord *St. Leonards* reversed the decision on that point only.

In *Taylor* v. *Linley* (1) the same point came before Lord *Campbell*, and he held that, although a railway company had demised its undertaking to another company for 1000 years at a fixed annual rental, secured by a power of re-entry, with an option to the lessees to become the purchasers, its shares were not within the *Mortmain Act*.

It is true that Lord *Romilly*, in *Ware* v. *Cumberlege* (2), held railway shares to be within the *Mortmain Act*, but how he came to that conclusion it would be difficult to understand. That decision, however, was expressly overruled by Lord *Cranworth* in *Edwards* v. *Hall* (3), and the same conclusion was arrived at by Sir *James Lewis Knight Bruce*, when Vice-Chancellor, in *Ashton* v. *Lord Langdale* (4), and by Lord *Hatherley*, when Vice-Chancellor, in *In re Langham's Trusts* (5); though it is true that those two learned Judges drew the distinction, which has been so much relied on by the Plaintiff's counsel in this case, between shares in the company and a mortgage by the company, which they both held to be within the Act. Sir *James Lewis Knight Bruce* came to the conclusion that the debentures, being mortgages of the undertaking and tolls, came within the *Mortmain Act*, and felt so strongly upon the subject that he expressly dissented from the view adopted by Lord *Langdale* in *Walker* v. *Milne* (6). Lord *Hatherley*, also, in *In re Langham's Trusts*, drew the same distinction between shares and debentures.

That seems to me a refinement of distinction between cases as to which I agree with the opinion of Lord *Langdale* in *Walker* v. *Milne*, that there is no material difference, and though I feel a profound respect generally for the judgment of Sir *James Lewis Knight Bruce*, I entirely dissent from it in this instance; because, to say that shares in a company are not an interest in land, but that an assignment of them, which is what a debenture really amounts to, is such an interest, seems so unreasonable, that I should have

6 Ch. D. 669

(1) 2 D. F. & J. 84.
(2) 20 Beav. 503.
(3) 6 D. M. & G. 74.
(4) 4 De G. & Sm. 402.
(5) 10 Hare, 446.
(6) 11 Beav. 507.

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decided the contrary without hesitation if it had not been for those two decisions.

But I think all questions are now removed by *Gardner* v. *London, Chatham, and Dover Railway Company* (1), which decided that a mortgage debenture made by a railway company in the form given in Schedule C. of the *Companies Clauses Consolidation Act*, 1845, does not give the debenture holder a specific charge upon the surplus lands of the company, or the proceeds of the sale of them, so as to entitle him to an order for a receiver of the sale moneys or interim rents. Therefore the mortgagee has only a right to take the tolls, and it follows that he has not an interest which is within the *Mortmain Act*.

Solicitors: *Walter, Moojen, & Son; J. W. Hickin.*

V.-C. M. 1876 *June* 28.

DALLAS *v.* GLYN.

[1874 D. 154.]

Attachment—Suit not brought to a Hearing—Notice—Rules of Court, 1875, *Order* XLIV., *r.* 2.

The new practice by which writs of attachment are only to be issued after notice to the party sought to be attached applies to all orders made subsequent to the *Judicature Act* coming into force, and applies whether the suits in which the orders have been made are being carried on under the old or the new practice.

Garling v. *Royds* (2) not followed.

Statement.

THIS was a motion to discharge an order obtained *ex parte* for an attachment against the Defendant for default in delivering up on oath certain documents in accordance with a previous order.

The suit was instituted in 1874. No answer was required but a voluntary answer was put in during the year 1875, and notice of motion for decree might in point of time have been served or a replication filed before the time when the *Judicature Act* came into force. The bill asked, amongst other things, for the delivery up of certain documents, and an order for their delivery was made on the 1st of May, 1876, but service of it on the Defendant was not

(1) Law Rep. 2 Ch. 201. (2) 1 Ch. D. 81.

effected till the 30th of May. On the 19th of June, the documents not having been produced, an order for attachment was made against the Defendant on an *ex parte* application in Court. This order it was now sought to discharge.

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Argument.

Higgins, Q.C., and *Herbert Smith*, for the motion:—

The question is, whether the new rule established by Order XLIV., rule 2, by which attachments are not granted *ex parte*, applies to the case of a suit commenced under the old practice. *Garling* v. *Royds* (1) is said to be an authority for allowing an order for attachment to go *ex parte* where a cause was not at issue when the *Judicature Act* came into force. But here the Plaintiff was in a position to put the cause at issue before November, and he is really seeking to obtain a benefit by his delay in prosecuting the suit.

Garling v. *Royds*, however, only applied to the case of a party taking a step in the suit, and will not be extended beyond that case: *In re A Solicitor* (2). The question was in fact simply, whether the new rule had taken away the Plaintiff's right to have an answer enforced in the way allowed when that mode of pleading was required.

Glasse, Q.C., and *Morshead*, for the Plaintiff:—

The latter words of the judgment in *In re A Solicitor* shew that the rule laid down in *Garling* v. *Royds* is, that a Plaintiff is entitled in enforcing orders by attachment, as in other respects, to take every process for bringing to a hearing a suit under the old practice if it was not at issue before the *Judicature Act* came into force. There is no difference in principle between an attachment for want of an answer and for any other kind of default.

Higgins, in reply.

MALINS, V.C.:—

Judgment.

This is a point of very considerable importance, and as there seems to be some conflict of opinion I should have been glad if it could have been taken to the Court of Appeal. [His Lordship

(1) 1 Ch. D. 81. (2) 1 Ch. D. 445.

V.-C. M. 1876 DALLAS v. GLYN. Judgment.

then referred to the facts, and continued:—] On the 19th of June I was applied to for leave to issue this attachment, and I was very properly referred to Order XLIV., rule 2. On the words of that order I should have required notice to be given of the intention to apply for the attachment, but the decision of Vice-Chancellor *Hall* in *Garling* v. *Royds* (1) was mentioned. That was a case of an attachment for want of an answer, in which it was perfectly clear that under the old practice an attachment was a matter of course, as it would also have been in the present case. I also understand that the Judge to whom Vice-Chancellor *Hall* alludes as having consulted in *Garling* v. *Royds* was the Master of the Rolls.

Having, therefore, brought before me what must be considered as the opinion of those two learned Judges, I followed it. At the same time I am sorry that I did so, because, in my opinion, the new practice as to attachments makes a very important and, I think, a very beneficial change. It has frequently happened that an attachment has issued in cases in which it is perfectly clear that it would not have been necessary to resort to that extreme measure if the adverse parties had been brought before the Court, and the consequences of disobedience to the order had been explained to them, and I think the change of practice was intended to remedy that state of things.

I think, therefore, with great deference to those learned Judges, that it was intended that in no case whatever should an attachment issue in future without notice to the person sought to be attached. In the present case, if notice had been given the Defendant would have appeared, and I should have explained that the previous order must be obeyed, and I would, at all events, have given an opportunity for an undertaking to hand over the documents applied for within a limited period. That is the protection which this order throws around parties to suits, and therefore I beg to say, with great deference, that I do not concur in the decision in *Garling* v. *Royds*, and further, that I shall in future treat the new rule as applying to orders in all suits, whatever the stage at which they have arrived. If there had been a decision of the Appeal Court supporting *Garling* v.

(1) 1 Ch. D. 81.

Royds (1) I should be bound to follow it, but until that is done I must act upon my own judgment.

Then there is the further question, whether *Garling* v. *Royds* covers this case. Where a case is not brought distinctly within the old practice, it is quite clear from *In re A Solicitor* (2) that an attachment cannot issue without notice. The latter part of the judgment is referred to as making the old practice apply in all cases where no final decree has been made. But it must be made quite clear that this is a case for the application of the old practice, if the application of the new rule is to be prevented.

Now in this case the bill was filed in September 1874, and no answer was required. It is therefore perfectly plain that the Plaintiff was for a considerable time before the Act came into force in a situation in which he could have served a notice of motion for decree. Then the rule laid down is, that a cause is to go on under the old practice up to the time when notice of motion for decree might have been served, and after that the new practice is to be followed.

I am, therefore, on this ground, of opinion that the decision of *Garling* v. *Royds* does not apply to this case, and also on the ground that it was a case of an attachment for want of an answer, which this is not. But I should not have followed it if it had applied to the facts of the present case, because the new rule is one favouring the liberty of the subject, and I think ought to be construed liberally. On all these grounds, therefore, I come to the conclusion that the writ of attachment must be discharged. But it will be without prejudice to any new application.

Solicitors: *Rickards & Walker ; T. R. Kent.*

(1) 1 Ch. D. 81. (2) 1 Ch. D. 445.

V.-C. M.
1876
July 12.

BISHOP *v.* WALL.

[1876 B. 280.]

Married Woman—Separate Property—Disposition by Will.

By marriage settlement personal property was assigned to trustees upon trust to pay the income to the wife for her separate use for life, without power of anticipation, and after her decease, in case her husband should survive, to pay him so much of the income as she should by deed or will appoint for his life, and subject thereto for the children of the marriage; and in case there should be no children, then upon trust in case the wife should survive her husband, for her, her executors, administrators, and assigns, for her sole and separate use; but if she should not survive her husband, then for such of her relations as she should, notwithstanding coverture, by deed or will appoint.

The wife made a will in exercise of the power during coverture, and survived her husband without having had issue of the marriage:—

Held, upon demurrer, that the will, made during coverture, was a good disposition of all the property.

Statement.

BY an indenture of settlement dated the 9th of December, 1868, made upon the marriage of *Christopher H. Barnes* and *Mary Ann Tabor Wall*, certain personal property to which *Mary Ann Tabor Wall* was entitled was assigned to trustees upon trust to pay the income thereof to and for the separate use of Mrs. *Barnes* for her life, without power of anticipation; and after her decease, in case the said *Christopher H. Barnes* should survive, to pay him so much of the income as she should by deed or will appoint for his life, and, subject thereto, to hold the trust property for the children of the marriage as therein mentioned; and in case there should be no children (which event happened) it was declared that the trustees should hold and dispose of the trust property upon trust in case Mrs. *Barnes* should survive her husband in trust for her, her executors, administrators and assigns, absolutely, for her sole and separate use; but if she should not survive her husband, then upon trust for such one or more of the descendants of the parents of Mrs. *Barnes* as she should, notwithstanding coverture, by any deed or by will direct, limit, or appoint; and, in default thereof, upon trust for such person or persons as at the time of the death

of Mrs. *Barnes* would have become entitled thereto under and according to the statute.

Christopher H. Barnes died on the 25th of February, 1875, leaving his widow him surviving, who died on the 4th of August, 1875, without having again been married.

There were no issue of the marriage.

Statement.

On the 28th of December, 1874, and during her husband's lifetime, Mrs. *Barnes* executed a will by which, in virtue of the power given her by the marriage settlement and by virtue of every other power or authority in any wise enabling her in that behalf, she appointed trustees and executors, and gave certain specific and pecuniary legacies; and as to all the rest, residue, and remainder of her estate and effects, and whether in possession, reversion, remainder, or expectancy, and over which she had any power of disposition, she gave, devised, and bequeathed the same to her trustees, their heirs, executors, and administrators; and she directed them to sell and convert into money all her real and personal estate upon trust, after payment of her debts and legacies, to divide the residue thereof into three parts, and pay one of such parts to *Philip Wall* for his absolute use; another third part to the children of her sister *Ellen Wall*, equally between them; and the remaining third part to the children of her brother *Thomas Tabor Wall*, in manner therein mentioned.

The Plaintiffs, who were the legatees under the will, alleged that the will operated as a good disposition of the property, and they claimed that the trusts of the will, so far as related to the property comprised in the settlement, might be carried into effect; and also, so far as might be necessary, the trusts of the settlement might be performed and carried into execution; and that the share and interest of the Plaintiffs in the settled property might be ascertained and paid to them and others so entitled.

The next of kin of the testatrix disputed the will, and the question was raised upon demurrer by the next of kin in pursuance of an arrangement between the parties.

Argument.

C. Howard, in support of the demurrer:—

It is submitted that, in consequence of Mrs. *Barnes* having survived her husband, and died without re-executing her will, it is

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inoperative to pass any share, estate, or interest in the settled property to the Plaintiffs, and consequently that she died intestate as to such property, which on her death passed to and became the property of her next of kin, and the Plaintiffs consequently are not entitled to any part of such property under the will. There are only three ways in which the will of a married woman can be upheld. First, when it is made in pursuance of a power; secondly, when made with her husband's consent; and, thirdly, when disposing of her separate estate. This will was made in exercise of a power given to her only in case of her dying in her husband's lifetime, and there is no allegation that it was made with her husband's consent. She survived her husband, and this event was not within the power, therefore the will should have been re-executed in order to pass the capital of the property which was given to her separate use after the husband's death: *Noble* v. *Willock* (1).

T. A. Roberts, for the Plaintiffs:—

I admit that a married woman can only make a will where she does so under a power or with consent of her husband, or where she has separate property. This is a case of separate estate. The life interest in the property was settled to the separate use of Mrs. *Barnes*, and after the death of her husband the capital was settled upon her, her executors, administrators, and assigns, for her separate use, therefore she had the whole property for her separate use, and had the same power as a *feme sole* to dispose of it. This comes within the decision of *Taylor* v. *Meads* (2), where it was held that a married woman having property settled to her separate use, and not restrained from alienation, has, as incident to her separate estate, and without any express power, a complete right of alienation by instrument *inter vivos* (not acknowledged under the *Fines and Recoveries Act*), or by will, and there is no distinction in this respect between an equitable fee and other property. That case was referred to in *Pride* v. *Bubb* (3).

C. Howard, in reply.

(1) Law Rep. 8 Ch. 778; Ibid. 7 H. L. 580.

(2) 34 L. J. (Ch.) 203.

(3) Law Rep. 7 Ch. 64.

MALINS, V.C.:—

The effect of the settlement made upon the marriage of Mr. and Mrs. *Barnes* is this: that the trustees are to hold the property upon trust to pay the income to Mrs. *Barnes* for her separate use for life, and after her decease, if her husband should survive her, to pay him so much of the income as she should by deed or will appoint for his life, and subject thereto for the children of the marriage, and if there should be no children, then, if Mrs. *Barnes* should survive her husband, which she did, upon trust for Mrs. *Barnes*, her executors, administrators, and assigns, absolutely, for her sole and separate use. The result is that she had a life estate in the income for her separate use, and the capital was given to her, her executors, administrators, and assigns, for her separate use. It is settled that where personal property is given to *A.* for life, and afterwards the capital is given to the executors and administrators of *A.*, the effect is to give the estate to *A.* absolutely, and it makes no difference that the income is given to the separate use of *A.* for life, and the capital to *A.*, her executors and administrators, for her separate use, therefore she had the whole for her separate use. Of course she could not dispose of her life estate by her will, but her will, made during coverture, was a good disposition of the whole property, and being a good will during coverture, the fact of her having survived her husband makes no difference, and the will still continues good. The case of *Taylor* v. *Meads* (1) is, I think, entirely applicable to this case. The demurrer must therefore be overruled, with an expression of opinion of the Court that the limitation in the settlement gave the testatrix an absolute estate in the property for her separate use, and that her will was a good disposition of the property.

Solicitors: *Rogers & Chave.*

(1) 34 L. J. (Ch.) 203. 11 Jur. N.S. 166

V.-C. M.
1876
July 11, 12.

In re LOVETT.
AMBLER *v.* LINDSAY.

[1876 L. 53.]

Administration—Executors who have not proved—Executor de son Tort.

A creditor of a testator brought an action against the executors, who had not proved but had got in part of the assets in *Australia*, alleging that they had paid some of the legacies, but refused to pay the funeral expenses and debts; and also against other Defendants, alleging that they had got in a portion of the assets in *England*, and that they threatened to dispose of such assets without regard to the debts. The Plaintiff claimed as against the executors, administration of the estate and payment of the debts; and against the other Defendants he claimed an injunction to restrain them from parting with the assets:—

Held, upon demurrer to the claim, that the executors were rightly sued although they had not proved; and that the other Defendants were properly made parties as executors *de son tort*.

Rowsell v. *Morris* (1) commented upon.

Statement.

THIS was a demurrer by the Defendants Messrs. *Hunter, Gwatkin, & Co.*, to the following statement of claim:—

John Lovett, being possessed of considerable personal estate in *Melbourne*, made his will and testament, dated the 25th of November, 1872, and after giving certain legacies therein mentioned, he thereby appointed the Defendants *Samuel J. Lindsay* and *Peter Facy* executors and trustees of his will. *J. Lovett* died on the 28th of May, 1874. The last-named Defendants (as the Plaintiff believes, without proving the will) have by themselves or their agents taken possession of the personal estate of *John Lovett* in *Melbourne* aforesaid. The same Defendants have in like manner distributed or otherwise disposed of portions of the personal estate in payment of some of the legacies, and have not paid the funeral expenses or any of the debts of the deceased. The Defendants Messrs. *Hunter, Gwatkin, & Co.*, have got in or received in *England*, and have now in their possession and control, a portion of the said estate considerably more than sufficient to pay the said funeral expenses and debts. The last-named De-

(1) Law Rep. 17 Eq. 20.

V.-C. M. 1876 *In re* LOVETT. AMBLER *v.* LINDSAY. Statement.

fendants threaten, and, as the Plaintiff believes, intend, to distribute or otherwise dispose of the portion of the said personal estate of the said deceased which has so come to their hands without regard to the funeral expenses or debts.

The Plaintiff is a creditor of *John Lovett*, deceased, for the sum of £453 11*s.* due and owing to him for medical attendance and other services performed by him for the deceased, and for moneys paid and expended by him for the funeral expenses of the deceased, and otherwise on his account, under an agreement in writing dated the 1st of December, 1872, and made between the Plaintiff and one *Samuel Lindsay* in that behalf authorized for and on behalf of the deceased. There remains justly due and owing to the Plaintiff the said sum of £453 11*s.*, which the Defendants, although frequently requested so to do, have neglected and refused to pay.

The Plaintiff claimed—

1. Administration in this Court of the personal estate of *John Lovett*, deceased, and for that purpose all proper directions and accounts.

2. Payment out of the said estate to the Plaintiff and other the creditors of the deceased of the debts due and owing to them respectively.

3. An injunction against the Defendants Messrs. *Hunter, Gwatkin, & Co.*, restraining them respectively from parting with the portion of the estate come to their hands except under the direction of this Court.

4. Such further or other relief as the nature of the case may require.

Argument.

J. Pearson, Q.C., and *Romer*, in support of the demurrer:—

The claim for relief in this case is divided into two distinct branches. The first is a claim against the two executors of the testator, *Lindsay* and *Facy*, for administration of the estate; and the second is a claim against the Defendants Messrs. *Hunters, Gwatkin, & Co.*, that they may be restrained from parting with a portion of the testator's property which has come into their hands. The ground of demurrer upon the first branch of this claim is that the executors have not yet proved the will, and you cannot have a

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suit for the administration of an estate without a properly constituted legal personal representative of the testator before the Court. This was decided in *Creazor* v. *Robinson* (1) and *Penny* v. *Watts* (2); and in the case of *Cary* v. *Hills* (3) the Master of the Rolls (Lord *Romilly*) said: "You cannot administer the personal estate of a testator in Chancery unless you have his legal personal representative before the Court." The present Master of the Rolls adhered to this view of the law in *Rowsell* v. *Morris* (4), where he decided that if the personal representative is not before the Court, no decree can be made in the suit, even though an executor *de son tort* is before the Court. These decisions are, no doubt, at variance with your Lordship's decisions in the two cases of *Rayner* v. *Koehler* (5) and *Coote* v. *Whittington* (6), but the fact that there have been such conflicting opinions is, at any rate, a ground for hesitation, and is a sufficient excuse for our urging a contrary view to that which your Lordship before expressed.

Then, as to the second ground, it is laid down that you cannot sue a person for misappropriating the assets of a testator without joining in the defence the properly constituted personal representative, and you must charge fraud or collusion between them. This is settled by *Alsager* v. *Rowley* (7), *Saunders* v. *Druce* (8), and *Hilliard* v. *Eiffe* (9). It is not charged that the Defendants are executors *de son tort*, and to make them liable as such, there must be a distinct charge to that effect. There is no charge that they have misappropriated the assets; it is only alleged that they have received assets in *England;* if so, they hold them for the executors as agents, and no one is entitled to those assets but the executors.

Glasse, Q.C., and *Bond Coxe*, for the Plaintiff:—

As to the first ground of demurrer, it is distinctly alleged in this claim that the two executors have taken possession of the assets of the testator in *Australia*, and have misapplied them by paying legacies without paying the creditors; and whether they

(1) 14 Beav. 589.
(2) 2 Ph. 149.
(3) Law Rep. 15 Eq. 79, 82.
(4) Ibid. 17 Eq. 20.
(5) Law Rep. 14 Eq. 262.
(6) Ibid. 16 Eq. 534.
(7) 6 Ves. 748.
(8) 3 Drew. 140.
(9) Law Rep. 7 H. L. 39.

have proved the will or not, they may be sued. If they have not proved the will, then they are executors *de son tort*. If executors elect to act, they are liable to be sued before probate. This was held by your Lordship in *Rayner* v. *Koehler* (1), and again in *Coote* v. *Whittington* (2), and in the latter case your Lordship fully considered the question, shewing what the law has always been. The cases there cited are sufficient to shew the fallacy of the arguments for this demurrer. The principle is supported by *Vickers* v. *Bell* (3), *Cottle* v. *Aldrich* (4), *Gedge* v. *Traill*, cited in *Bowsher* v. *Watkins* (5), *Holland* v. *Prior* (6), and *Webster* v. *Webster* (7).

Then, as to *Hunters, Gwatkin, & Co.*, it is alleged that they have got into their possession part of the English assets, and they threaten and intend to distribute or otherwise dispose of such assets without regard to the funeral expenses or debts. It is not alleged that they are acting as agents of the executors, but they have intermeddled with the affairs of the testator in this country, and have got possession of his assets; they are therefore acting in their own wrong as executors *de son tort*. But even if they acted under the authority of the executors, they may be sued jointly with the executors, as in *Cottle* v. *Aldrich* and *Gedge* v. *Traill*. The latter case shews that it is not necessary to charge collusion.

It is said that there is no express charge that the Defendants are acting as executors *de son tort*, but that is not necessary if you find sufficient allegations to shew that they are doing so, and no charges can be stronger than those contained in this claim. What the Plaintiff wants is to prevent Messrs. *Hunters, Gwatkin, & Co.* from parting with the assets in their hands and sending them over to *Australia* to be dealt with in the manner the Australian assets have been, by an improper payment of legacies in priority to debts.

Pearson, in reply:—

An executor *de son tort* does not represent the entire estate, and you cannot sue him alone. You cannot have a general adminis-

(1) Law Rep. 14 Eq. 262.
(2) Ibid. 16 Eq. 534.
(3) 4 D. J. & S. 274.
(4) 4 M. & S. 175.
(5) 1 Russ. & My. 281, n.
(6) 1 My. & K. 237.
(7) 10 Ves. 93.

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tration with accounts from the death of the testator without the legal personal representative. In *Rayner* v. *Koehler* (1) the ground of the decision was that the Defendant had received all the estate of the testator, and that is not the case here. In *Bowsher* v. *Watkins* (2) the executor was one of the partners, and the Defendants were the whole firm. There was in that case a charge of collusion. The Defendant in *Holland* v. *Prior* (3) was the representative of a deceased representative, and he was made a party because there was privity between them. There is no charge against *Hunters, Gwatkin, & Co.* to establish a case of executor *de son tort.* They have only received money as agents for the executors; there is no case to justify any suit against them. They could have no authority to pay funeral expenses and debts. It is stated that they have considerably more funds in their hands than would pay the funeral expenses and debts. If so, the Court would not prevent legacies from being paid merely because there happened to be some small debts outstanding. There is no dispute here who are the executors, and the only ground for suing without a legal personal representative is when it is uncertain who the executor is, and then you may come to the Court for a receiver, but you cannot have a general administration of the estate.

Judgment.

MALINS, V.C.:—

This case has occupied some time in argument, but the points raised are, in my opinion, free from difficulty. The allegations in the claim, which must be taken for the purpose of this demurrer to be true, are that the Defendants *Lindsay* and *Facy* were appointed executors of the will of *John Lovett,* and that, without proving the will, they have taken possession of the personal estate of the testator in *Melbourne,* and that they have distributed portions of the estate in payment of some of the legacies, and have not paid the funeral expenses or any of the debts of the deceased. Then the allegation against the other Defendants, *Hunters, Gwatkin, & Co.,* is, that they have got in or received in *England,* and have now in their possession, a portion of the estate of the deceased

(1) Law Rep. 14 Eq. 262. (2) 1 Russ. & My. 281, n.
(3) 1 My. & K. 237.

considerably more than sufficient to pay the funeral expenses and debts, and that they threaten to distribute such portion of the personal estate without paying the funeral expenses and debts.

Now, I must assume that the law of *Melbourne* is the same as the law of *England*, and that, if an executor in *Australia*, taking his testator's assets in his hands to be sufficient for all purposes, paid legacies before debts, and afterwards found the debts to be larger than was expected, the payment of the legacies would be no defence to a creditor suing for payment of his debt.

It is quite true, as Mr. *Pearson* has said, that where the assets are abundantly sufficient an executor may, on his own responsibility, pay the legacies before he pays the debts of his testator, but he does it at his peril. On the other hand, if an executor pays legacies and refuses to pay debts, that amounts to a *devastavit*. Then the demurrer admitting all the statements in the claim, the case is this—the Plaintiff says he is a creditor for funeral expenses and debts, which amount to a sum of £453 11*s*., and the testator having died two years ago, the executors have paid some of the legacies, and refuse to pay the debts claimed.

As the executors are resident abroad the Plaintiff might institute a suit in *Melbourne;* but that is a course which any one would desire to avoid if possible, and finding that these Defendants, Messrs. *Hunters, Gwatkin, & Co.*, a well-known firm of solicitors, have assets in this country, no farther off than *Lincoln's Inn*, it is very natural that the Plaintiff should wish to obtain payment of his debts out of those assets. The first and second portion of the prayer is directed to obtaining relief against the executors by means of an administration of the estate in this Court, and for payment out of the estate to the Plaintiff, and other the creditors of the deceased, of the debts due and owing to them respectively; and the third part of the prayer is for an injunction to restrain the other Defendants, Messrs. *Hunters, Gwatkin, & Co.*, from parting with the portion of the estate come to their hands, except under the direction of the Court.

Now, considering that these allegations are admitted, for the purpose of the demurrer, to be true, and that I have before me executors who can pay and will not pay, surely there is nothing unreasonable in this Plaintiff, when he finds assets in *Lincoln's Inn*

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more than sufficient to pay funeral expenses and debts, that he should wish to restrain the Defendants from sending those assets over to *Australia* to the executors who have already, as it is alleged, dealt with the assets improperly, and have paid some of the legacies in priority to the debts.

The question, then, is, whether this suit can be maintained, first, against the Defendants, who are the executors; and, secondly, against the other Defendants, who have got the assets in their hands. As to the first point, it is said that the executors have not proved the will, and that a suit cannot be maintained against them on that ground. If that were the law, then it would be permitting persons to take advantage of their own wrong. A man might get possession of the assets of a testator in his character of executor, and might waste them, and be guilty of any misapplication of the funds, and yet he might not be capable of being sued because he had not proved the will. On that subject we are relieved from difficulty by the decision of Vice-Chancellor *Stuart* in the case of *Vickers* v. *Bell* (1), which was affirmed on appeal, where it was held that an executor who had not proved the will was a proper party to an administration suit provided he had acted as executor, though he might not have received anything as such; and, *à fortiori*, you may maintain a suit against an executor when he has received part of the assets. The true criterion of the executor's position is whether he is appointed executor, and whether he has meddled with the estate. If he has, then he can be sued without more.

It is distinctly alleged that these Defendants, the executors, have interfered with the estate, and have received a portion of the assets, and consequently they are properly made parties to the suit, although they have not proved the will. The executors will, no doubt, have to prove the will, and I feel perfectly sure that, until they have proved, gentlemen standing in the high position of Messrs. *Hunters, Gwatkin, & Co.*, as solicitors, will never remit to them the assets in their hands, but will retain them till the executors have clothed themselves with a legal title to receive the funds.

The next question is, whether Messrs. *Hunters, Gwatkin, & Co.*,

(1) 4 D. J. & S. 274. 10 Jun 1876

are properly sued by the Plaintiff. It has been argued that they are not sued as executors *de son tort*, because it is not stated upon the claim that they are executors *de son tort;* but that is not necessary, if it appears from the ordinary interpretation of the allegations that they have intermeddled with the estate. It is stated that they, having no authority to do so, have got in or received in *England*, and have now in their possession and control, a portion of the estate of the deceased. That is, in my opinion, a sufficient allegation to make those Defendants executors *de son tort*, and they can, consequently, be sued in this Court as such.

That has, on several occasions, been the subject of discussion before me, and I have thoroughly considered the point. The last occasion of its being argued was in a case of *Coote* v. *Whittington* (1), which came before me upon appeal from a decision of a County Court Judge. I am aware that that case was subjected to criticism by Sir *George Jessel* in *Rowsell* v. *Morris* (2); and I think, in answer to the observations made by him, I may say that he expressed himself somewhat incautiously, for he decides that you cannot administer an estate in this Court without having before it the legal personal representative of the testator or intestate, although an executor *de son tort* or the legal personal representative of such an executor is before the Court. If, as he says, you cannot sue a person as executor *de son tort*, then any person may enter upon and take possession of the property of a deceased, and he cannot be sued for doing so. I know of no character in which such a man can be sued except it is that of an executor *de son tort*, as I pointed out in the case of *Coote* v. *Whittington*. It would be the height of injustice if a man could possess himself of the assets of a testator, and because he did not choose to clothe himself with the character of administrator, could not therefore be sued in respect of such assets.

I have already decided the contrary, first in *Rayner* v. *Koehler* (3), and then in *Coote* v. *Whittington;* and I believe that what I decided in those cases has been the rule ever since the statute of *Elizabeth*.

(1) Law Rep. 16 Eq. 534. (2) Law Rep. 17 Eq. 20.
(3) Law Rep. 14 Eq. 262.

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Now, I will examine the cases which have been cited, and which, I think, completely bear out what I have said.

The first case is that of *Cottle* v. *Aldrich* (1), where it was held that although a person cannot be charged as executor *de son tort* while he acts under a power of attorney made to him by one of the several executors who had proved the will, yet, if he continued to act after the death of such executor, he might be charged as executor *de son tort*, though he acted under the advice of another of the executors who had not proved; and Lord *Ellenborough* there said (2): "Admitting that *Denton* was rightful executor, yet if the Defendant interfered in an assumed character of executrix, and if, never being executrix, she acted as such, and made claim in that character, may she not be charged as executrix *de son tort*? . . . The question is, has she acted as such? We are not called upon to say what might be the effect of *Denton's* making probate and confirming all the acts which she has done, but as the case stands at present, she is clothed with no right herself, nor derives any from others who might have assumed it."

Then, in *Sharland* v. *Mildon* (3), the widow of the testator employed *A.* to collect some of the debts due to the testator's estate, which *A.* accordingly collected and paid over to the widow, believing that she was the administratrix. The widow subsequently died without having obtained letters of administration, and it was held that *A.*, having received moneys which he knew to be part of the estate of the testator, and not having accounted for such moneys to the legal personal representative of the testator, *A.* was liable to be sued as executor *de son tort*.

In *Gedge* v. *Traill* (4) the bill was filed by a creditor of a testator against the executor and certain persons who were in partnership with the executor, and it alleged that the partnership claimed to be entitled to retain assets which were in their hands in satisfaction of a debt which they pretended to be due to them from the testator, but it did not charge in express terms that the executor was colluding with his co-partners. The creditor was there held to have, under such circumstances, a right to sue all

(1) 4 M. & S. 175.
(2) Ibid. 177.
(3) 5 Hare, 469.
(4) 1 Russ. & My. 281, n.

the partners; and a demurrer by the partners, other than the executor, was overruled. And in *Bowsher* v. *Watkins* (1) the same principle was maintained.

The last case was *Holland* v. *Prior* (2). There the question was whether the executor of an administratrix who had received assets of her intestate could be made a party to a suit instituted by a creditor of that intestate, and it was held that he might and ought to be made a defendant in such a suit. Lord *Brougham*, in delivering judgment, said, in speaking of what parties were necessary in an administration suit: "The rule is to stop short at the personal representatives, unless where there is insolvency, or where other parties stand in such relation to the deceased or his estate or his representative, that they may be said either to have been mixed with him and his affairs during his lifetime, or to have aided his representative after his decease in withdrawing his estate from his creditors, or to have undertaken more directly a *quasi* representation of him." Then he says: "Under the second description falls the case of those who by collusion with the executors have received or wasted his property, which may be likened to that of an executor *de son tort*, a representation fixed upon those who intermeddle with the estate as the penalty of their interference."

All these cases prove that where a person does interfere and intermeddle with the estate of a deceased without authority, he may be sued in this Court as executor *de son tort*.

There is still one authority remaining, that of *Webster* v. *Webster* (3), which I referred to in *Coote* v. *Whittington* (4). There a plea of the *Statute of Limitations* by an executor was allowed. The testator died in 1786, though probate was not taken out till 1802. The allegation of the bill being that the Defendant had possessed the personal estate, and therefore might have been sued as executor *de son tort* previously to 1792. The Lord Chancellor there admitted he might be charged as executor *de son tort* if it was proved that he had done any act, and thought the plea good upon the circumstances stated in the bill, considering that the Defendant had possessed himself of the estate and effects of the testator previously to 1792, and if so, an action might have been brought

(1) 1 Russ. & My. 277.
(2) 1 My. & K. 237, 240.
(3) 10 Ves. 93.
(4) Law Rep. 16 Eq. 534.

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at the moment. If an action could be brought, so also could a suit be instituted.

It appears to me, therefore, in the first place, that this claim is properly filed against the executors before probate has been taken out by them, and that these assets being in the hands of Messrs. *Hunters, Gwatkin, & Co.*, they may be properly sued on the ground of being executors *de son tort*. Further, as I have said, it is impossible for them to part with these assets until the will is proved, because if they do they will have to pay over again.

Now, the inconvenience of the form in which the Defendants have thought fit to bring on the case is palpable. They admit they have money in their hands. I invited them to state what the real facts of the case were; for all I know it may turn out that there is no debt at all, or that the amount of money in their hands is very small, but they have declined to give any information, and have thought fit to defend the case upon these technical grounds. As far as appears by the statements in this claim, I think the Plaintiff was quite justified in bringing this action to prevent these Defendants from parting with the money without providing for the debts; and it cannot possibly do any harm to Messrs. *Hunters, Gwatkin, & Co.*, whose duty is to pay the money over to those persons who are legally entitled to it. The merits of the case on the part of the Defendants are none, and the convenience none. On these grounds I must overrule the demurrer, and the Defendants may have fourteen days to put in their answer.

Solicitors for Plaintiff: *Kynaston & Gasquet.*
Solicitors for Defendants: *Hunters, Gwatkin, & Co.*

In re WALKER'S MORTGAGE TRUSTS.

V.-C. M. 1876 July 21.

Trustee Act, 1850, *ss.* 2, 10—*Joint Mortgage—Outstanding Legal Estate —Former Trustee.*

One of three joint mortgagees, who were trustees, went abroad, and in his absence the mortgage was paid off, and by a deed, to which he, with the other trustees, was named a party, but which he never executed, the debt and security, except the legal estate outstanding in him, were vested in the transferee of the mortgage. Afterwards a new trustee was by deed appointed a trustee in his place:—

Held, that the neglect or refusal of the old trustee to convey the outstanding legal estate brought the case within the Trustee Acts, and that the Court had jurisdiction under those Acts to vest in the transferee the outstanding legal estate.

In re Osborn's Mortgage Trusts (1) distinguished.

THIS was a petition under the Trustee Acts.

Statement.

The Rev. *Jonathan Dawson* died on the 29th of January, 1855, having by his will, dated the 2nd of April, 1853, given his real and personal estate to his wife (who afterwards became Mrs. *Longley*), and *Thomas George Pearse* and *Richard Roger Western* upon certain trusts.

By way of investing a sum of £6700, part of the testator's estate, on real security, the trustees, by a deed of the 29th of July, 1863, took a transfer from a Miss *Elizabeth Walker*, with the concurrence of the persons entitled to the equity of redemption, who were parties to the deed, of a mortgage of real estate for that amount, then vested in Miss *Walker*, whereby the legal estate became vested in the trustees.

On the 6th of March, 1866, the trustees of the will gave notice to the mortgagors to call in the mortgage, and shortly afterwards, in the same month of March, 1866, *Thomas George Pearse* left *England* to reside in the *United States* of *America*.

By a deed of the 26th of February, 1867, indorsed on that of the 29th of July, 1863, and expressed to be made between Mr. and Mrs. *Longley* and Messrs. *Pearse* and *Western* of the one part, and *Thomas Griffiths Powell*, one of the Petitioners, of the other part, the debt and security were assigned to *Powell*, by whom the

(1) Law Rep. 12 Eq. 392.

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principal sum and all arrears of interest had been previously paid off. This deed was executed by Mr. and Mrs. *Longley* and by Mr. *Western*, and the indorsed receipt was also signed by them, and the deed was duly acknowledged by Mrs. *Longley*. But it was not executed, nor the receipt signed, by *Pearse*, who refused to concur.

Statement.

By a deed of the 18th of March, 1867, *Robinson Fowler* was appointed a trustee of *Jonathan Dawson's* will in the place of *Pearse*, and the £6700 was invested in the names of the new trustees.

The present petition was presented by *Powell*, and the mortgagors and the persons interested in the money advanced by *Powell*. It stated the above facts, and also alleged that *Pearse* wilfully declined to execute the conveyance, and that, although he was believed to be in *England*, his address was unknown to the Petitioners. The petition was entitled in the matter of the Trustee Acts, and asked that an order might be made vesting in *Powell* the lands and hereditaments comprised in the indenture of the 29th of July, 1863, for all the legal or other estate or interest in one undivided third or other part or share vested in *Pearse* under the same indenture, and subject to the trusts and equities subsisting thereunder affecting the same.

Argument.

Reginald Hughes, in support of the petition:—

A difficulty has been suggested in this case from the decision in *In re Osborn's Mortgage Trusts* (1), where it was held that a legal estate outstanding in a mortgagee was not within the provisions of the Trustee Acts. But it is submitted that the present case comes within the exceptions mentioned in the judgment in that case. It is intended to transfer the mortgage, and the transferee requires the outstanding estate to be got in.

W. E. M. Tomlinson, for the Respondents, who were the present trustees of *Dawson's* will, and the beneficiaries under the will, consented.

Judgment.

MALINS, V.C.:—

I understand that the transferee will be satisfied if I make the

(1) Law Rep. 12 Eq. 392.

order asked for by the petition. I think the case is within the Act, and I will make the order prefaced by the words, "The Court being of opinion that *Thomas George Pearse* is a trustee of the legal estate vested in him by the indenture of the 29th of July, 1863, for the Petitioner *Edward Griffith Powell* within the meaning of the Trustee Acts."

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Solicitors: *Duncan, Murton, Warren, & Gardner; Emmets & Co.*

EVANS *v.* WALKER.

V.-C. M. 1876 *July* 25.

[Filed in 1816.]

Will—Perpetuity—Annuity or Absolute Interest.

A testator gave to *A. B.* an annuity of £50 per annum for her life, and after her decease to the children she might have, born in wedlock, equally to be divided between them during their lives, and after the decease of the survivor, to go to his nephew and his two nieces equally between them. *A. B.* having died without issue:—

Held, that the gift to the nephew and nieces was not void for remoteness, and that they took the capital from whence the annuity proceeded absolutely, in equal shares as tenants in common.

13 C.L.D. 56
19 C.L.D. 294
296
523

Statement.

JOHN BROWN, by his will, dated the 13th of February, 1812, made the following disposition of his property: "I give and bequeath unto *Maria Evans* £50 per annum from the day of my decease during the term of her natural life, and from and after her decease to the children she may have born in wedlock, equally to be divided between them, share and share alike, during their natural lives, the said annuity to be paid half-yearly; and from and after the decease of the survivors herein named to go to my nephew *Edwin Walker*, and my two nieces, *Sally Brown Walker* and *Eliza Walker*, equally between them, and I hereby desire that my nephew and nieces will see it fulfilled. I declare this my last will and testament."

This suit was instituted in 1816 for the purpose of having a sum of money set apart out of the estate of the testator to answer the annuity of £50, and a sum of £1666 13*s.* 4*d.* was accordingly paid into Court for that purpose. *Maria Evans* died without

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having been married, in 1874. The nephew and two nieces of the testator died some time since, and a petition was now presented by their legal personal representatives to have the money paid out of Court to them in equal shares.

Argument.

W. Barber, and *De Castro*, in support of the petition :—

There are two questions raised upon this petition; first, whether the gift to the nephew and two nieces of the testator is void for remoteness; and, secondly, whether they take the annuity absolutely or only for life.

The first question is settled by *Ashley* v. *Ashley* (1), and your Lordship's judgment in *Stuart* v. *Cockerell* (2), where you said that property might be given to unborn persons for life with remainder over, provided the ascertainment of the persons to take in remainder was not postponed till after the death of such unborn persons.

The second question arose in *Stokes* v. *Heron* (3), where the testator gave annuities to his wife and his mother, and after their decease to be equally divided among his three children, and these were held to be perpetual annuities; and in *Bent* v. *Cullen* (4) it was held that a gift of £50 a year to the testator's wife for life, and afterwards the said £50 to his daughters and his granddaughter, or the survivors, was a gift in remainder of the principal, which would produce £50 a year.

We say, therefore, that the nephew and nieces are entitled to the absolute interest in the money from which the annuity proceeded.

[They also cited *Blewitt* v. *Roberts* (5), *Hicks* v. *Ross* (6), and *Hawkins* on Wills (7).]

Hull, for the next of kin of the testator :—

The gift of this annuity to the nephew and nieces of the testator is void for remoteness. It is to *Maria Evans* for life, and then to unborn children, and the gift over is not until the death

(1) 6 Sim. 358.
(2) Law Rep. 7 Eq. 363.
(3) 12 Cl. & F. 161.
(4) Law Rep. 6 Ch. 235.
(5) Cr. & Ph. 274.
(6) Law Rep. 14 Eq. 141.
(7) Page 126.

of the survivor of the unborn children. There is therefore an intestacy after the death of the children of *Maria Evans*, and the next of kin of the testator are entitled to the fund from which the annuity was provided.

Argument.

Under any circumstances the legacy was only for the lives of the nephew and nieces, and they being dead the capital is undisposed of. The word "annuity" signifies a payment for life. No appropriation of the capital was contemplated. This was decided in *Lett* v. *Randall* (1), where there was an annuity given to the testator's wife, and after her decease to be equally divided among all his children then living, and the annuities were held to be limited to the lives of the widow and children; and there was a similar decision in *Cooke* v. *Bowler* (2).

MALINS, V.C.:—

Judgment.

The first point is, whether the gift to the nephew and two nieces of the testator is void for remoteness, and it is quite clear to my mind that it is not, because there is no objection to a gift to unborn children for life, and then to an ascertained person, provided the vesting is not postponed. That point I commented upon in *Stuart* v. *Cockerell* (3). Property may be given by will or secured by settlement to an unborn person for life, or to several unborn persons successively for life, with remainders over, provided that the vesting of the remainders, or the ascertainment of those who are to take in remainder, be not postponed till after the death of such unborn person or persons. Therefore the circumstance of there being life estates given to all the children unborn of *Maria Evans* does not create a perpetuity if there are persons capable of taking immediately, and here there are such persons. So they take immediate vested interests.

The next question is, what is the effect of this gift after the decease of the survivors of *Maria Evans*' children, "to my nephew *Edwin Walker*, and my two nieces *Sally Brown Walker* and *Elizabeth Walker*, equally between them." If he had intended them to take for life only, he would have used words similar to those used in the previous gift, and that shews that they were not

(1) 2 D. F. & J. 388. (2) 2 Keen, 54.
(3) Law Rep. 7 Eq. 363.

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to take for their lives, but to take absolutely. That is the construction I should put upon the will on principle, but the question is settled by the cases of *Stokes* v. *Heron* (1) and *Bent* v. *Cullen* (2). The latter case is almost identical with this, for there the testator gave to his wife £50 a year to be paid out of the interest, dividends, and produce arising from his personal property, and after her decease he gave the said £50 to his two daughters and his granddaughter or the survivors, and it was held to be a gift to the survivors of the principal, which would produce the annuity of £50. I, therefore, understand the law to be, that when there is a gift of an annuity to one for life, or to several for lives, and then a gift afterwards to another person, without any restriction, that means that the last taker is to have the capital from which the annuity was produced; consequently this annuity being given to the nephew and two nieces generally, without any words of restriction, they take the capital absolutely. The order will be:—The Court being of opinion that the nephew and two nieces took the absolute interest in the capital equally as tenants in common, Let the fund in Court be paid to their legal personal representatives,—that is to say, one third to the representatives of the nephew, and one third to the representatives of each of the nieces.

Solicitors: *Trinders & Curtis Hayward.*

V.-C. M. 1876 *July* 26.

In re BIRD'S TRUSTS.

Rectification of Deed on Petition.

By a marriage settlement the wife's interest in real estate was granted and assigned to trustees, their executors, administrators, and assigns, upon the usual trusts in a settlement, with the omission of the word "heirs" in every case in which the fee simple was evidently intended to be passed:—

Held, upon petition under the *Trustees Relief Act*, that the deed must be rectified by the insertion of the word "heirs," in order to effect the intention of the parties.

Statement.

BY a settlement made on the marriage of *George Brown* and *Harriette Brown*, then *Harriette Bird*, dated the 4th of February,

(1) 12 Cl. & F. 161. (2) Law Rep. 6 Ch. 235.

1863, after reciting that it was agreed that the property of *Harriette Brown* should be settled in manner therein mentioned, *Harriette Brown*, with the consent of *George Brown*, granted and assigned to *J. Watson*, *J. Brown*, and *H. Nisbet*, all the estate, share, and interest to which she was or might become entitled under the will of her father, *W. Bird*, and also all other property of the said *H. Brown* of what nature or kind soever, to hold the same unto the said trustees, their executors, administrators, and assigns, upon trust for *H. Brown*, her executors, administrators, and assigns, until the solemnization of the marriage, and afterwards to stand possessed of the said trust property upon trust, during the joint lives of *G. Brown* and *H. Brown*, to pay the interest, dividends, and annual proceeds thereof to *H. Brown* for her sole and separate use, without power of anticipation, and after the death of such one of them as should first die, to pay the interest, dividends, and annual proceeds of the said trust property to the survivor of them for life, and after the death of the survivor in trust for the child or children of the marriage in manner therein mentioned. And if there should be no children of the marriage, then in case *G. Brown* should die in the lifetime of *H. Brown*, in trust for *H. Brown*, her executors, administrators, or assigns, but in case *H. Brown* should die in the lifetime of *George Brown*, then in trust for *George Brown*, his executors, administrators, and assigns.

Harriette Brown died on the 16th of May, 1863, in the lifetime of *George Brown*, without having had any issue.

Under the will of *W. Bird*, *Harriette Brown* had become entitled to a fourth part of certain freehold estates and to a small amount of personalty, and these estates were sold under a power contained in the will, and the proceeds were paid into Court by the trustees of the will under the *Trustees Relief Act*.

A petition was now presented by *George Brown* praying that he might be declared absolutely entitled in fee simple to the share of *Harriette Brown*, deceased, in the hereditaments by the will of the testator, *W. Bird*, devised, and if it should be deemed necessary for the purpose of such declaration, that the settlement of the 4th of February, 1863, might be reformed or rectified by the introduction of the word "heirs" immediately before the word "executors'

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in every place in which such last-mentioned words occurred, or otherwise in such manner, or by the introduction of such prefatory words in the order to be made on the petition, as to the Court should seem just, and that the sum of £500 now standing to the credit of the matter might be paid to the Petitioner, his executors, administrators, or assigns, and that the trustees might be ordered to pay and transfer to the Petitioner all moneys in their hands, or which might come to their hands, on account of the share of *Harriette Brown* in the hereditaments devised by the will of *W. Bird.*

There were two affidavits in support of the petition shewing the intention of the parties, one by *George Brown* and the other by the brother-in-law of *Harriette Brown.*

Argument.

J. Pearson, Q.C., and *M. G. Davidson*, for the petition:—

It is evident that the marriage settlement of the 4th of February, 1863, cannot carry out the intention of the parties. The property to be settled was principally real estate, and the omission throughout the deed of the word "heirs" was clearly a mistake, either of the person who drew it or the clerk who copied it, or it might have occurred through ignorance of the fact that there was real estate to be settled. The settlement should, therefore, be corrected so as to carry out the intentions of the parties. Such palpable mistakes as these will be corrected by the Court.

Owen, for the trustees, cited *Holliday* v. *Overton* (1) and *Tatham* v. *Vernon* (2).

Judgment.

MALINS, V.C.:—

It is evident that the object of this settlement was to convey an absolute estate in the real and personal property to which Mrs. *Bird* was entitled under the will of her father, and this was to be settled in the usual way, first giving a life estate. That being the object of the settlement, this property, consisting principally of real estate, is conveyed in the first place to the trustees, their executors, administrators and assigns, the effect of which is to convey to the trustees nothing more than a life estate jointly in

(1) 15 Beav. 480. (2) 29 Beav. 604.

the freehold property, and so the legal estate was vested in them for life, and the trusts were meant to extend to the fee simple. This is shewn clearly by the first limitation to Mrs. *Bird* until the solemnization of the marriage, for it never could have been the intention to give her a life estate only until the marriage was solemnized, and yet it is to be held in trust for her, her executors, administrators, and assigns. It is perfectly clear that the words have been used by mistake, and that the property should have been conveyed to the trustees, their heirs, executors, administrators, and assigns, and that the trust, until the marriage, should have been to Mrs. *Brown* in fee simple, instead of to her, her executors, administrators, and assigns. It is equally clear that the further trusts of the settlement could not have been carried out unless the freehold had been conveyed to the trustees, their heirs, executors, administrators, and assigns. Under these circumstances, I have no hesitation in deciding that the settlement must be rectified, and the word "heirs" introduced in every instance before the words "executors, administrators, and assigns."

The only question is whether the settlement can be rectified upon petition, or whether words are to be introduced into the order for the purpose of carrying this object into effect.

[The case of *Lewis* v. *Hillman* (1) was cited to shew that the Court had power, upon a petition under the *Trustees Relief Act*, for the payment out of Court of money, to declare the validity or invalidity of any deed on which the claim to the money was rested. *In re Hoare's Trusts* (2) was also cited; see also *In re De la Touche's Settlement* (3).]

Upon these authorities the Court has, I think, power to order the settlement to be rectified, and the order will be made accordingly.

Solicitors: *M. & F. Davidson.*

(1) 3 H. L. C. 607. (2) 4 Giff. 254.
(3) Law Rep. 10 Eq. 599.

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CHARTER *v.* CHARTER.

[1874 C. 280.]

Administration—Costs—Probate Litigation.

A grant of probate to *A.*, who alleged that he was the executor devisee and legatee named in the will of *C.*, his father, was revoked by the Judge of the Probate Court, on the ground that testator's son *B.*, and not *A.*, was the person intended to have been named in the will, and probate was granted to *B.*

On appeal to the House of Lords, their Lordships being equally divided, the question whether the decree of the Probate Court should be reversed was, according to the rule "*Semper præsumitur pro negante*," answered in the negative, "and the costs of both parties, as well in the Court below as in this House, were ordered to be paid out of the estate"; and with this direction the cause was remitted to the Court of Probate.

The personal estate being insufficient, a bill was filed by *A.* for administration of the testator's real and personal estate in order to obtain payment of his costs in the probate litigation, and of a debt alleged to be due to him in respect of his acts as an executor before revocation of the grant of probate. The bill also claimed title as devisee and legatee, but this was abandoned at the bar :—

Held, that the direction of the House of Lords, being based upon and not in this respect exceeding the jurisdiction of the Probate Court which was limited to personal estate, did not operate to make the Plaintiff's costs of the probate litigation payable out of the real estate; and accordingly that the administration must be limited to the testator's personal estate.

Statement.

IN this suit by the Plaintiff, as heir-at-law and alleged devisee, to administer the real and personal estate of his father, the main question was whether the Plaintiff was entitled to have his costs of litigation in the Probate Court relating to the will charged upon the testator's real estate.

The testator, *Forster Charter*, a *Northumberland* farmer, had two sons, *William Forster Charter*, the Plaintiff, and *Charles Charter*, the Defendant. By his will, made in June, 1859, and drawn for him at his request by the vicar of the parish, testator appointed "my son *Forster Charter* as the executor" of his will, and gave, devised, and bequeathed to him all his real and personal estate for his use and benefit, and for the benefit of the persons named in the will.

The testator died on the 8th of August, 1869, and on the 16th of September, 1869, probate of his will was granted in common form by the District Registrar of *Newcastle-on-Tyne* to "*William Forster Charter*," the Plaintiff, as executor therein named. The Plaintiff thereupon entered into possession, and receipt of the rents and profits, and continued the administration and management of the testator's farm and estate.

In August, 1870, *Charles Charter* cited *William Forster Charter* before the Court of Probate to shew cause why this grant of probate should not be recalled on the ground that *Charles Charter* was the person appointed, or intended by the testator to be appointed, sole executor thereof.

On the 21st of November, 1871, Lord *Penzance*, after a hearing of the case, and having reserved his judgment, pronounced in favour of *Charles Charter*, and ordered the probate granted to *William Forster Charter* to be revoked (1).

An appeal was brought to the House of Lords, and on the 24th of July, 1874, their Lordships being equally divided "thereupon, according to the ancient rule in law, *Semper præsumitur pro negante*," the question whether Lord *Penzance's* decree should be reversed was determined in the negative, and the costs of both parties, as well in the Court below as in this House, were ordered to be paid out of the estate; and with these directions the cause was remitted to the Court of Probate (2).

The Plaintiff, *William Forster Charter*, claimed to be a creditor on the estate for sums expended by him as executor before revocation of the grant of probate, and also for his costs of the probate litigation. The personal estate being insufficient for payment of the alleged debt and costs, he had filed a bill for administration of the testator's real and personal estate; to have the rights and interests of the Plaintiff and all persons interested therein ascertained and determined; an account of what was due to the Plaintiff in respect of debts, probate and other testamentary expenses paid by him, and the costs to which he had been put, including the costs to which he was entitled by the order of the House of Lords; and to have the total amount paid out of the estate, and, if necessary, raised by sale or mortgage of the real estate.

(1) Law Rep. 2 P. & M. 315. (2) Law Rep. 7 H. L. 364.

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The Plaintiff, by his bill, also submitted that he was the person named by testator in his will and intended to be thereby benefited, and that he was not estopped from shewing that he was devisee under the will, and, as such, entitled to testator's real estate.

This part of the case was not, however, pressed on behalf of the Plaintiff.

Argument.

Sir *H. Jackson*, Q.C., and *T. A. Roberts*, for the Plaintiff:—

Independently of the order of the House of Lords, the Plaintiff, as a creditor on the estate, is entitled to a decree for administration, and to have the costs of the litigation in the Probate Court and the House of Lords thrown upon the real estate, or at least to have the real and personal estate marshalled. The whole estate, both real and personal, of a deceased person is now liable for his debts and liabilities, and one of those liabilities is the costs of administration, being a liability which the testator has himself created by the ambiguity of his will: *Row* v. *Row* (1); *Daniell's* Ch. Prac. (2).

Although the Plaintiff cannot in this Court dispute the grant of probate to the Defendant, he was not, though a party to the proceedings, technically cited as heir in the Probate Court; and therefore he is not estopped from bringing ejectment, or adducing new evidence in proof of his contention that he, and not the Defendant, was the devisee under the will: 20 & 21 Vict. c. 77, ss. 61, 62, 63.

By the decision of the House of Lords, the costs of both parties were given out of the estate generally, and the personal estate being insufficient, the direction can only have been intended, and is quite wide enough, to throw these costs, which are properly costs of administration, upon the real estate.

Kay, Q.C., and *C. T. Simpson*, for the Defendant:—

The bill, so far as it claims that the Plaintiff is entitled to the real estate as devisee, must be dismissed with costs; and the bill must also be dismissed so far as it seeks to have the costs of the probate proceedings paid out of the real estate.

The Court of Probate, having jurisdiction over personal estate

(1) Law Rep. 7 Eq. 414. (2) Pages 1271, 1885, 1286, 1294.

only, had no jurisdiction to order the costs of probate litigation, even when the heir was cited, to be paid out of the real estate: *Young* v. *Dendy* (1); *Newton* v. *Newton* (2). The order of the House of Lords, being made on appeal from the Probate Court, cannot be intended to exceed the jurisdiction of that Court, or to direct anything which that Court had no power to direct. All that is done by the order of the House of Lords is to remit the suit to the Court below, and if the Court of Probate could not make the costs a charge upon the realty, the order of the House of Lords cannot have that effect. Independently, however, of any question as to the jurisdiction of the House of Lords, on appeal from the Probate Court, to make an order throwing the costs of the litigation upon the real estate, the expenses proving the will are not, under any circumstances, debts or liabilities which are chargeable on real estate; and no case can be found in which a person has been held entitled to file a bill against the devisee to recover administration costs incurred in the Probate Court. The Act 3 & 4 Will. 4, c. 104, though it renders freehold and copyhold estates assets for the payment of simple contract or specialty debts, does not enable a Court of Equity to order costs incurred in the Probate Court, or testamentary expenses, to be paid out of real estate.

As an administration suit the bill is wrongly framed, as the real estate cannot be administered except in a suit on behalf of the Plaintiff and all the creditors, which this is not: *Ponsford* v. *Hartley* (3); *Bedford* v. *Leigh* (4).

[*Hemming*, Q.C., *amicus curiæ*, referred to *Worraker* v. *Pryer* (5), as shewing that the old practice in this respect remains unaltered by the new procedure.]

Even where the question, for the determination of which a suit has become necessary, relates to testator's real estate only, the costs will in the first instance be borne by the personal estate only: *Pickford* v. *Brown* (6); and being costs of litigation in which the Plaintiff has failed, he cannot, even as against the per-

(1) Law Rep. 1 P. & M. 344.
(2) 13 Ir. Ch. Rep. 245.
(3) 2 J. & H. 736.
(4) 2 Dick. 707.
(5) 2 Ch. D. 109.
(6) 2 K. & J. 426.

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sonal estate, claim to have them raised by administration. No question of marshalling the assets in favour of the Plaintiff's claim can arise, as the Plaintiff claims by his bill to be entitled to the real estate; and although he has abandoned that which is the real end of his bill, he cannot, having failed in this respect, rest the suit upon this merely incidental question of costs: *Preece* v. *Seale* (1). In any case, the personal estate being insufficient, the direction of the House of Lords cannot, in contravention of the well-established rule of practice, deprive the Defendant of his right as executor to payment of his costs in priority: *Gaunt* v. *Taylor* (2).

The Plaintiff cannot rely upon the form in which the decision of the House of Lords was arrived at, as the decision, *semper præsumitur pro negante*, is as binding as if it had been pronounced *nemine dissentiente*: *Beamish* v. *Beamish* (3); *Attorney-General* v. *Dean of Windsor* (4); *Reg.* v. *Millis* (5).

R. A. Pritchard followed on the same side.

Sir *H. Jackson*, in reply.

Judgment.

BACON, V.C.:—

I quite agree that this is a most unfortunate suit. It is one of extreme difficulty, in my opinion, and one in which it is impossible to do what seems to be just between the parties consistently with the established rules of law, which I am not at liberty to infringe. That the suit is mainly instituted for the purpose of procuring payment of the costs which have been incurred in the Probate Court and in the House of Lords is too plain to admit of question. That is the Plaintiff's object in filing this bill. If he can accomplish it, in my opinion he will get no more than, law apart, in plain moral justice he is entitled to; but the question is whether, according to law, he can establish that claim.

Now, that the suit in the Probate Court related only to the personal estate, is, as a matter of law, unquestionable. The Probate

(1) 3 Jur. (N.S.) 711.
(2) 2 Hare, 413.
(3) 9 H. L. C. 274, 338.
(4) 8 Ibid. 369, 392.
(5) 10 Cl. & F. 534.

Court had no power to deal with it otherwise than as a case in which, under its jurisdiction, the administration of the personal estate was to be carried into effect. In order to arrive at that decision, of course the first thing to be considered was the will, and in the will two things are tied or mixed together in such a manner as to have occasioned all the difficulties not only which have given rise to, but which have ever existed in, the case; for in the same words and in the same breath the testator proposes to dispose of his real and personal estate. As matter of law the things are separable, and must be separated for the purposes of this present litigation, and for a great many other purposes. The Probate Court decided, and meant to decide, that the costs of the litigation should be paid out of the estate. Then that raises the question, what is the meaning of the words "the estate"? Could it be any other than the estate which the Probate Court had jurisdiction over? And can it be said that the Probate Court had any jurisdiction over the real estate? If the devise of the real estate had been to a person wholly different from the executor named, it is clear beyond the possibility of argument that the Probate Court could not have fixed upon that devise any part of the costs of the litigation.

That is covered by the decision in *Newton* v. *Newton* (1), because there the descended estate was as much out of the reach of the Probate Court as a devised estate could be, and did not differ from a devised estate for any practical purpose. The previous decision of Lord *Penzance* himself is to the same effect, and was, if possible, more pointedly, that the Court had no jurisdiction. The Irish case presents this feature, that the Judge in *Ireland*, having some doubts about the subject of jurisdiction, wrote to consult Sir *Creswell Creswell* upon the subject, and he gave an expressed and plain opinion that the Probate Court *qua* Probate Court had no jurisdiction over the real estate. Then, when it comes to the House of Lords, I do not think there is any difference in the signification or legal effect of the words used by the House of Lords and those which are to be found in the decree of the Probate Court. They direct the payment of the costs out of the estate. But, as has been truly said, they were

(1) 13 Ir. Ch. Rep. 245.

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sitting there only as an Appellate tribunal from the Probate Court; they did not possess, and they did not attempt to exercise, any jurisdiction other than that which the Probate Court might have exercised, and having pronounced their judgment they remit the matter in order that their judgment may be carried into effect by the process and under the authority of the Probate Court. That, therefore, does not advance the case in the slightest degree. The decision of the House of Lords is, of course, open to no question or criticism. It is plain upon both points, both on that which relates to the appointment of the younger son as executor and donee of all the personal estate and, as the words are inseparable and found in the same sentence, that the real estate is given to him also. That was the substance of the decision in the House of Lords, and it would be frivolous as well as wrong to affect to doubt that it covers the real estate as to the construction, effect, and validity of the will. It is remarkable that with regard to the four learned Lords—inferior to no Judges that this Court has ever heard of in learning and acuteness—so marked a difference of opinion should have existed between them. The difficulty is confessed. The opinions are expressed with great clearness and distinctness. They are as directly opposed to each other as any two things in the world can be; and at length the ultimate decision is arrived at by applying to it a certain legal maxim, the real meaning and effect of which, put into plainer language, is: "If you find a knot which you cannot untie, this is a knife with which you may cut it." That is the "*Semper præsumitur pro negante*" maxim, and that is the result of the decision in the House of Lords, and by that means it is so established that it can never be questioned successfully in any Court. I do not say that no question might be raised, because, possibly, the ingenuity of counsel might raise a question about it. But it is impossible for me to consider that it could ever be successfully raised. If the Court had not, as in my opinion by law it had not, any jurisdiction over the real estate, I must read the words as meaning that the costs of the litigation are to be paid out of the personal estate. The conclusion is, to my mind, irresistible.

There remains the other question which has been argued. The Plaintiff, for many months after the testator's death, had cast upon

him by the authority of the law the duties, and at the same time the rights, of the legal personal representative of the testator, and he so acted, and during that period of administration nobody could say that he did wrong. His authority is revoked; but all that he did while it existed I must presume was rightly done. That gives him a title to have the estate administered, and to have the accounts taken. He is not to remain liable if he is liable for anything. He is not to remain unpaid if anything is due to him out of the personal estate. In the course of those transactions he did, as the Defendant does not dispute, pay debts which were debts chargeable against the personal estate; leviable by execution if the mortgagee had brought an action and obtained judgment out of the personal estate; and in the discharge of his duty, therefore, without any particular regard to the difference between the legal and personal estate, he did pay three sums of money, amounting to something short of £200, and that he did pay them the Defendant does not dispute; but as to the two first, he says—he tendered no evidence upon the subject (indeed if he did this would not be a convenient opportunity to consider the weight of his evidence)—that he himself furnished the money for those payments. That is a matter which, if a decree is made for administration, may be inquired into as well as any other fact; but that he approved of the payments is evidenced from the fact which he relies upon, that at a later period, as to the third payment, he tendered or sent a cheque for the amount, or what was supposed to be the amount, and offered to pay that himself.

Under these circumstances it cannot be said that the Plaintiff is not entitled to have a decree for the administration of the personal estate. If it should arise that, upon taking that account, there exists any debt which can be charged against the real estate by some future proceeding in this cause, that right may be asserted. I cannot tell what the personal estate consists of. I cannot adopt the Defendant's statement that it amounts to £35 only. All I can do upon that subject is to direct the account to be taken. I am bound to deal with the subject which is raised by the Plaintiff's bill as to the costs of the litigation being charged upon the real estate. I am bound to decide, as I am deciding, that they are not

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so charged. They can in no sense be called so. They have not been expressed to be so by the judgments either of the House of Lords or of the Probate Court, nor, as I have before said, have either of those Courts jurisdiction so to deal with it, and I am not at liberty to assume that they intended to exercise the jurisdiction, although I am under the conviction that they believed when they directed payment out of the estate that it would be paid out of the devised estate. What they thought upon the subject is of course immaterial, except so far as it justifies the proceeding which the Plaintiff has taken.

[His Lordship, after referring to the statements and prayer of the bill, said that the Plaintiff was entitled to a decree for administration, but not to a decree directed to the administration of the real and personal estate. His Lordship then proceeded:—] He cannot be entitled to a decree directing the trusts of the will to be performed, and that his rights and interests may be ascertained and determined, because there are no trusts of the will upon which he is (on his case, as I understand it, now to be proved and established) entitled or in the slightest degree interested; for that he has no interest or right under the will has been decided. There being allegations enough in the bill and in the answer to enable the Court to decide the question, I decide it without hesitation by reference to the judgment of the House of Lords. But I cannot perceive that there was any necessity for going into evidence on that subject over again. The effect has been to increase the costs of the litigation to a very unreasonable degree; and although I entirely disapprove of the intention of the Plaintiff, if it were his intention, to try to get some decision from this Court upon the construction of the will at variance with the decision of the House of Lords, I think that the attempt may be so far excused, or at least so far is excused, looking at the conduct the Defendant has pursued upon this subject, as not to make it necessary, as otherwise I should be bound to do, to make the Plaintiff pay the costs of that unsustainable and improper allegation contained in his bill, if it be read as an assertion that he may by ejectment, or some other proceeding, call in question the decision, and say in another Court that the House of Lords has decided nothing against him.

So much of the bill, therefore, in my opinion, as asserts the

Plaintiff's right as the person designated in the will to be entitled to the real estate must be dismissed; but, for the reason I have mentioned, it must be dismissed without any costs. All that remains is simply administration. The Plaintiff, for a certain period, acted as the lawful administrator. The Defendant, since then, has ousted him from that character and taken it upon himself. There must be a decree for the administration of the testator's personal estate, not for his real estate. In that administration the Plaintiff will be entitled to all he can claim against the personal estate, and he will be entitled to all that he can claim upon any other ground. Whether he can or not, this is not a suitable time for deciding. I do not forget it has been urged upon me that the bill, not being a bill on behalf of the Plaintiff himself and all other creditors, it could not therefore be dealt with as giving this Court jurisdiction over the real estate. I do not forget what was said upon that subject as to the liability of the real estate to pay anything else; but the liability of the personal estate to pay all the costs of the litigation is established by the decree. What that personal estate may consist of I know not at present. What it may be will be ascertained upon the decree; and if, upon the working out of the decree, the Plaintiff should found any clearer right than he seems at present to possess, to prove any part of his claim available against the real estate, it will not be too late to do him justice in that respect. If there is any personal estate, it is admitted that it will be applicable to pay the costs of the litigation in both the Courts. If those costs are to be paid, I know of no principle which should give them to the Defendant exclusively. If there is a sufficient fund to satisfy them both, then both will be paid. If it is deficient, each must be paid rateably. All that I can do at present therefore will be to dismiss so much of the Plaintiff's bill as asserts the Plaintiff to be entitled as devisee of real estate, or claims costs of the probate litigation as against the real estate; and to limit the decree entirely to the administration of the personal estate.

Solicitors: *Helder & Roberts; E. Flux & Leadbitter.*

V.-C. B.

1876

May 25.

ALTMAN *v.* ROYAL AQUARIUM SOCIETY.

[1876 A. 72.]

Injunction—Covenant by Lessor of Stall in a Public Building that Lessee should have exclusive Right of Sale of specified Goods.

Where the Defendants, owners of a public building, have contracted with the Plaintiff, that he, renting a stall from them, shall have the exclusive right to exhibit and sell certain specified classes of goods, an injunction will lie against the Defendants for permitting the exhibition and sale by other renters of stalls within the building of goods so specified.

Statement.

MOTION.

By an agreement dated the 3rd of July, 1876, and made between the Defendants, the *Royal Aquarium and Summer and Winter Garden Society, Limited,* at *Westminster,* by *William Wybrow Robertson,* the managing director of the society, of the one part, and the Plaintiffs, *Lewis Joseph Altman* and *Harris Brown,* trading as *L. J. Altman & Co.,* thereinafter called the exhibitor, of the other part, the society agreed to let, and the exhibitor agreed to take, certain spaces in the *Aquarium* for the term of three years, from the 22nd of January, 1876, at the rent of £325, payable by equal quarterly payments in advance, such spaces to be used by the exhibitor for the purpose and with the sole right of exhibiting therein and selling English and foreign china, glass, and earthenware, chandeliers and lamps of all descriptions, with the exception of Venetian glass and terra cotta; and the sole right to sell and exhibit all descriptions of scents and perfumes within the company's premises. No goods or articles of any other description were to be exhibited therein or sold by the exhibitor without the permission in writing of the said society being first obtained. In case the exhibitor failed to pay the rent, or to observe and perform the regulations from time to time made by the directors, the society should have the power of putting an end to the agreement on giving seven days' notice in writing; but the exhibitor should, notwithstanding the agreement be so terminated by the society, remain liable for the rent to the end of the current year.

The Plaintiffs took possession of the stall, and used it for the sale of china, glass, earthenware, and other articles named in the agreement. The *Aquarium* was opened on the 22nd of January. Finding that other exhibitors were exhibiting and selling china, glass, and earthenware articles, the Plaintiffs called the attention of the managing director to the fact, but without redress; and on the 13th of May a writ was issued indorsed for specific performance of the agreement, for an injunction to restrain the sale of the goods, and for damages.

The Plaintiffs now, on notice dated the 13th of May, moved that the Defendants might be restrained from permitting, or neglecting to prevent, the exhibition or sale of English and foreign china, glass, and earthenware, chandeliers and lamps (not being Venetian glass or terra cotta), by any other persons or person than the Plaintiffs within the premises of the Defendants.

From the evidence in support it appeared that the other exhibitors who were exhibiting and selling china, glass, and earthenware at the opening of the *Aquarium*, were named *Wills*, *Marie Louise*, the *London Stereoscopic Company*, and *Fentum*, who were still exhibiting, and two, named *Ramsay* and Mrs. *Ryan*, who had left.

Julia Cohen, a witness for the Plaintiffs, deposed that she had bought at *Wills'* stall an earthenware flower-pot and stand, and a glass flower vase or tube; that at *Marie Louise's* stall she had bought a glass scent bottle; and at the stall of the *London Stereoscopic Company* a magnifying glass, and that articles similar to those she purchased were being exhibited. At the last-mentioned stall other articles of glass were being exhibited.

In opposition, *Bruce Phillips*, the sub-manager of the society, deposed that since the opening the only person who had been permitted to expose or offer for sale in the building any china, glass, earthenware, chandeliers or lamps of any description, was the Plaintiff *Altman*. He admitted that the Plaintiff complained of *Ramsay*, to whom deponent gave notice, but *Ramsay* disputed the Plaintiff's right to object, on the ground that biscuit ware which he, *Ramsay*, was selling, was not china. Deponent further said that *Ramsay*, some two months before (viz., in March, 1876), had left the society's premises. Mrs. *Ryan* dealt only, deponent believed, in toys. The Plaintiff objected to her exhibiting a box

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of playthings known as dolls' china. Mrs. *Ryan* had for some time left. *Wills* was a florist, and the only articles of glass or china exhibited in his stall were one or two ornamental flower-pots and some glass tubes for containing flowers. Madame *Marie Louise* was a jeweller, and did not sell or exhibit in the premises either glass, earthenware, or china, except that amongst the articles exhibited in her stall were a few silver-mounted scent or smelling bottles. The *Stereoscopic Company* did not exhibit or sell any glass, earthenware, or china, except magnifying glasses for inspecting photographs.

William Francis Knight, secretary to the art department of the society, said that *Fentum* was a dealer in ivory ornaments, and the only glass articles exhibited by him were some small looking glasses set in ivory frames and some ivory watch-stands having glass faces. The *Stereoscopic Company*, besides magnifying glasses, had some framed photographs, with glass placed over them.

Wills, florist, admitted selling cases for flowers made of *Minton's* tiling.

An assistant to *Marie Louise* deposed that the only glass articles sold or exhibited in the stall were a few silver or gilt-mounted smelling bottles. The stall was used for exhibiting jewellery, amongst which were some French brooches made of china.

In reply the Plaintiff *Altman* said that biscuit meant unglazed china; that *Ramsay* had sold, besides unglazed china, majolica and *faience;* that Mrs. *Ryan* had sold china toys of different descriptions, and glass inkstands; and that *Wills* was exhibiting and selling ornamental tiles. Plaintiff admitted that he did not object to the exhibition by Madame *Louise* of a few expensive scent or smelling bottles, provided the same were mounted in gold or silver, and that the value consisted, not in the glass, but in the gold or silver mounting; but said that Madame *Louise* had been for some time exhibiting and selling scent bottles with plated and other very cheap mountings, the value of which lay in the glass and not in the mounting. *Julia Cohen* said that when she bought the flower-pot she did not buy any flowers, nor was she asked to do so.

Argument.

Kay, Q.C., and *Jason Smith*, for the Plaintiffs:—

The sub-manager does not say that he stopped any of the

sellings complained of by the Plaintiff *Altman*. The case is substantially unanswered by the Defendants.

Argument.

Swanston, Q.C., and *W. W. Karslake*, for the Defendants:—

The Plaintiffs keep what in common parlance is called a "crockery shop." Such a trade is not interfered with by the sale of any conceivable article that has any glass in its composition or construction. The Court might, with equal justice, restrain the sale of a bottle of soda-water, or of a watch. Half the "jewellery" in the kingdom is glass over paint. Is cheap jewellery within this agreement? Neither looking-glasses, nor magnifying glasses, nor framed and glazed photographs, come under the description of crockery ware.

Covenants in restraint of trade will be construed reasonably; *London and North Western Railway Company* v. *Garnett* (1); *Josselyn* v. *Parson* (2).

Two of the persons complained of have left: as to them the cause of complaint is at an end.

The only instance of sale in breach of the covenant which has been proved is that of the one flower vase, which was sold to an emissary of the Plaintiff, who persuaded the florist into selling her the article. Manufactured evidence of that kind is always viewed by the Court with suspicion.

Judgment.

BACON, V.C.:—

In my opinion the Plaintiffs are entitled to that right which the Defendants have granted them by way of agreement.

I agree with Mr. *Swanston* that the terms of the agreement must be construed according to the common and ordinary sense and meaning of the words. [His Lordship read the words, and continued:—] The Defendants have the entire control over this exhibition, or bazaar, or whatever it is called, and they, for valuable consideration, have contracted with the Plaintiffs that none but they shall have the right to sell these goods within the building. Then what sort of excuse is offered in the course of the argument for the sale by *Ramsay*, for example, of articles of biscuit, majolica, and *faience?* It is true that all such acts of selling are now

(1) Law Rep. 9 Eq. 26. (2) Law Rep. 7 Ex. 127.

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over and gone; but the Plaintiffs' complaint is, that when they remonstrated, their remonstrances were unheeded.

There are, in truth, no facts in dispute. The facts as to *Wills*, the florist, are that he not only sells flowers in glazed flower-pots, but that he has a sale of *Minton's* coloured tiles for flower-pots and boxes; and it is to be observed that it is the Defendants—they who ought to have protected the Plaintiffs from breach of the agreement—who bring into Court exhibited articles of their own selection, and ask the Court to say whether the sale of such articles is a breach of the agreement. The Plaintiffs cannot, of course, except by purchasing them, bring into Court the articles which other persons not parties to the dispute are selling. But taking the Defendants on their own shewing, earthenware brooches are as much within the covenant as anything else made of earthenware; and though a very small article is produced, if made of earthenware, it is not the less within the agreement on that account.

As to the photographs, the selling of a magnifying glass, or the putting of a glass front to a photograph, can scarcely be called an infringement of this agreement.

But enough has been proved to shew that the Defendants have not been dealing fairly with the Plaintiffs; that they have broken the contract they have entered into with them; and the consequence is, the Defendants must be restrained from doing or permitting to be done anything in violation of the agreement.

There must be an injunction as moved for; and the costs of the motion will be costs in the cause.

Solicitor for the Plaintiffs: *W. A. Plunkett.*
Solicitors for the Defendants: *Pawle, Fearon, & Coldham.*

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May 26, 27, 30, 31.

1875 S. 47a.]

Advowson—Right of Presentation vested in Parishioners—Mode of Exercising the Right—Law of Public Meetings—Vote by Ballot.

The advowson of a parish church being vested in trustees who were bound to present the nominee of the parishioners and inhabitants, a vacancy occurred, and at a meeting of parishioners convened by the churchwardens, and presided over by one of them, the 30th of August was fixed upon for a meeting "to proceed to the election of a vicar." Meanwhile, upon the requisition of certain inhabitants, a meeting of the 25th of August, summoned by the churchwardens, but at which they declined to preside, was held, at which resolutions were passed to the effect that the election should be by ballot, on one day only, and at several polling places, and that the poll should be open from 9 to 9. On the 30th of August the meeting resolved upon was held, candidates were nominated, a show of hands taken, and a poll demanded, and one of the churchwardens, who was in the chair, announced that the poll would be taken by open voting, on the following and two successive days, at one polling place only, and that the poll would be kept open from 8 to 8. Upon a parishioner rising to move amendments similar to those of the 25th of August, the chairman left the chair, and declared the meeting at an end. After the churchwarden had left the chair, another chairman was chosen, and a series of resolutions, similar to those of the 25th of August, were moved and carried.

The poll having been taken in the way announced by the chairman of the meeting of the 30th of August:—

Held, that the conduct of the churchwardens had been erroneous and illegal; but, there being no evidence of any voter having been deprived of an opportunity of voting, that the election could not be disturbed.

Semble, an election by ballot, if duly resolved upon, is not at the present day an illegal mode of election.

Observations on *Faulkner* v. *Elger* (1) and *Edenborough* v. *Archbishop of Canterbury* (2).

The duties of churchwardens in conducting parish meetings, considered.

Statement.

ACTION.

By a deed dated the 2nd of June, 1656, in consideration of a competent sum of current English money, *Edward Drake* granted, bargained, and sold to *Josias Berners* and four others, and their heirs, all the church of *Clerkenwell*, rectory and parsonage, churchyard, soil, and buildings, and the advowson and vicarage, to hold

(1) 4 B. & C. 449. (2) 2 Russ. 93.

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to the use of them and their heirs for ever upon trust nevertheless "to and for the only use, benefit, and behoof of the parishioners and inhabitants of the parish of *St. James'*, *Clerkenwell*, and their successors for ever."

In June, 1875, the benefice became vacant by the acceptance of another living by the then incumbent, the Rev. *Robert Maguire*, and thereupon printed notices were issued by the authority of, and purporting to be signed by, the churchwardens, named *Edward Culver* and *Alfred Goad*, giving notice that a public meeting of "the parishioners and inhabitants assessed to the poor-rate" would be held in the vestry room of the parish church of *St. James'* on the 28th of July at 7 in the evening, "to take into consideration the necessary steps to be taken in the election of a vicar," and to adopt such course as might be deemed most desirable.

A meeting was accordingly held in the evening of the 28th of July, at which *Edward Culver*, one of the churchwardens, was in the chair. The chairman stated that there were twenty-one candidates for the living, and he suggested that the 30th of August should be fixed for the election at the vestry hall, with a preliminary meeting for the purpose of nomination. In answer to a question as to the system of voting to be adopted, the chairman said it would be "open." He also stated that he did not consider it necessary to have a polling place in each ward, inasmuch as that was not the case on the occasion of the last election. The meeting passed a resolution that it was desirable that the churchwardens should convene a meeting of the inhabitants for the 30th of August, 1875, at 7 o'clock in the evening, "to proceed to the election of a vicar." A parishioner named *Samuel Brighty* then moved that, in the event of a poll being required, there should be only one day's poll, which should be kept open from 8 A.M. to 8 P.M. The chairman said that such a resolution could not be put, because it was not according to the past history of the vestry, and that the mover was out of order in putting it. He said, however, he would see as to what was the ancient mode of conducting the election, and that he would consult the legal authorities of the parish; whereupon the motion was put and negatived.

A second meeting was, on requisition by some of the parishioners

and ratepayers, convened by the churchwardens, and held on the 11th of August, at which two of the candidates, the Rev. *John Henry Rose* and the Rev. *William Holderness*, delivered addresses.

A few days after this, another requisition signed by thirty-four parishioners and ratepayers was forwarded to the churchwardens, stating that, "having regard to the organic changes made in electoral law since the last election in 1857," they desired a meeting to be called "to decide as to the mode in which the votes should be taken at the ensuing election, and also as to the duration and hours of polling."

Thereupon a printed notice was issued, purporting to be signed by the churchwardens, reciting the terms of the requisition, and proceeding, "pursuant to the above requisition, we hereby convene a public meeting of the parishioners" . . . . to be held on the 25th of August, at seven in the evening. As to the signatures of this notice by the churchwardens, it appeared that they were appended to the draft from which the notice was printed, by Mr. *Robert Paget*, clerk to the vestry (a body constituted under the *Metropolis Local Management Act*, 18 & 19 Vict. c. 120), acting under general instructions from the churchwardens.

On the 25th of August a meeting accordingly assembled at seven o'clock in the evening at the *Amwell Street* parochial schoolrooms. Mr. *Culver*, the churchwarden, was not present at the meeting. The other churchwarden, Mr. *Goad*, was present, but he refused to take the chair. Thereupon the majority present elected one of the parishioners as chairman, and resolutions to the following effect were moved and carried—the first four unanimously, and the others by large majorities—that the churchwardens should be appointed returning officers—that in the event of a poll being demanded for the election of vicar, it should be taken by ballot—that the hours of polling should be from 9 A.M. to 9 P.M.—that there should be a polling place in each ward of the parish—that the poll should take place on one day only—and that the resolutions should be forwarded to the churchwardens, with a request that they would carry them out.

On the following day a copy of the resolutions was forwarded to the churchwardens, who immediately took the advice of counsel, and having on that day, the 26th, received an opinion to the effect

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that it would be advisable for them to ignore entirely the proceedings of the meeting of the day before, a placard stating the result of the opinion was drawn up by the authority of the churchwardens, and issued on the morning of the 30th of August.

On the evening of the 30th the meeting which, as above stated, had been resolved upon on the 28th of July, took place at the *Amwell Street* rooms at seven o'clock. More than 1000 persons were present, and Mr. *Culver* took the chair. Mr. *Rose* and Mr. *Holderness* were nominated, and the show of hands being greatly in favour of Mr. *Holderness,* a poll was demanded for Mr. *Rose.* The chairman then announced that the poll would be opened on the following day, would be open from eight in the morning and closed at eight in the evening, and would be continued for three consecutive days.

Upon this a great disturbance and uproar arose, in the midst of which the above-named Mr. *Brighty* having come forward to move an amendment, the chairman, without hearing him, rose and quitted the chair, declaring the meeting to be at an end. Thereupon another parishioner was voted into the chair, and a string of resolutions was passed endorsing those of the 25th of August, and protesting against the arrangements announced by Mr. *Culver.*

A written protest against the decision in favour of open instead of secret voting was, on the following day, served by Mr. *Brighty* upon the churchwardens, but the poll was, nevertheless, held on the following and two subsequent days at the vestry hall, and was kept open from 8 A.M. to 8 P.M., the method of voting being open and oral, and not by ballot.

Mr. *Rose* was elected by a majority of 2066 votes to 838, the voting constituency being about 7000.

The present action was commenced by writ issued on the 29th of November, 1875, by *George Thomas Shaw,* on behalf of himself and all other the parishioners and ratepayers of *St. James', Clerkenwell,* against *Edward John Thompson* and others, who were the present trustees of the deed, Messrs. *Culver* and *Goad,* the churchwardens, the Bishop of *London,* and the Rev. Mr. *Rose,* and the claim stated that by reason of the poll being closed at eight many of the parishioners who were working watchmakers were excluded from voting—charged that Mr. *Rose* was not duly elected because the

regulations as to the mode and time of the election resolved upon at the meeting of the 25th of August were not followed, and claimed that it might be declared that the election was null and void.

The points raised by the statement of defence of the trustees and churchwardens were, that according to the ancient usage and custom, "any meeting of the parishioners and inhabitants in vestry assembled, for the election of a vicar, was properly convened by the churchwardens"—that the first meeting of the 28th of July "acquiesced and in fact assented" that the election should, as to the manner of voting, the number of polling places, and the number of days and period during each day for which the poll should be kept open, be conducted in accordance with the ancient usage and custom relating to such election—that the ancient usage and custom were binding on the parishioners, and could not be properly departed from, at all events without the unanimous consent of the parishioners and inhabitants entitled to vote—and that the course to be adopted was finally and duly settled and agreed upon in accordance with the established usage and custom at the meeting of the 28th of July. They submitted that the meeting of the 30th of August was duly held and convened, that the announcements at that meeting by Mr. *Culver* as to the poll were "in strict accordance with the ancient usage or custom, and in conformity with the resolutions and arrangements passed and agreed to" at the meeting of the 28th of July; and that Mr. *Rose* was duly elected. They further submitted whether, in the absence of any special usage, custom, or statute authorizing or requiring the voting at an election of any kind to be taken by ballot, the only legal and valid mode of voting was not open and oral voting; and that the onus of proving that any such usage, custom, or statute existed in relation to the election of a vicar to *St. James', Clerkenwell,* was on the Plaintiff.

There was no dispute of fact, except as to the allegation that by reason of the poll closing at 8 several working men were prevented from voting. The result of the evidence was held by the Court to be that practically no working man was prevented by the arrangements that were made from recording his vote.

A minute book of the proceedings of the meetings at which Mr.

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Culver, the churchwarden, presided, kept by the vestry clerk, Mr. *Paget*, was produced by him.

The following entries were commented on in the judgment:—

The minute of proceedings on the 28th of July stated: "The following letter and opinion were laid before the churchwardens at that meeting." The opinion was an opinion given by Messrs. *Boulton & Son*, the solicitors to the vestry.

It was in evidence that this letter and opinion were not read to the meeting of the 28th of July; and Mr. *Paget*, in examination, said they were written for the information and guidance of the churchwardens privately, and hence were not communicated to the meeting.

No minute appeared or was taken by Mr. *Paget* of the proceedings of the 25th of August.

The minute of the 30th of August contained no statement of any amendment moved by Mr. *Brighty*, or any one else. It stated that "a vote of thanks having been passed to Mr. *Culver* for his services in the chair, the meeting adjourned." Mr. *Paget*, in cross-examination, said he could not remember who proposed or who seconded this vote, and his rough note of the proceedings contained no memorandum on the subject. Other witnesses disputed the fact, and said that if any such motion was made, it could not be heard at any distance, owing to the tumult and uproar.

It was also in evidence that the names of both churchwardens were in the first or an early list of Mr. *Rose's* supporters, but were afterwards withdrawn.

In cross-examination one of the churchwardens, Mr. *Goad*, said: "I consider it is the duty of the churchwardens, if they receive a requisition signed by many of the respectable inhabitants of the parish, to call a meeting; but I certainly don't consider it our duty to act on any resolutions they might pass at such meeting. I consider it a matter of courtesy to call a meeting at the request of a certain number of the parishioners." He further said that there was no fund out of which the expenses of the churchwardens could be paid. The funds of the church were exhausted, and they must either have a voluntary rate or a subscription. He considered that when the churchwardens had called one meeting, and re-

ceived instructions from that, his colleague and he were perfectly justified, when they found that the resolutions proposed to be passed at a second meeting went to upset those that were previously carried, in refusing to take the chair.

Argument.

Mr. *Kay*, Q.C., and Mr. *Idle*, for the Plaintiff:—

Repeated applications have been made to the Court with regard to elections under this bequest. The guiding principle of the decisions has always been, "You must find out whether the sense of the parish has been duly and properly taken, according to the mode which the parish itself provides." In this instance the parish returns everything by a general vestry; and it has been the custom at a general vestry to consider all questions as to the mode of electing the vicar. The vestry themselves are not entitled to exercise the right of election: *Carter* v. *Cropley* (1); it remains vested in "the parishioners and inhabitants of the parish paying rates and assessments to the church and poor": *Attorney-General* v. *Rutter* (2), following Lord *Hardwicke's* decision in *Attorney-General* v. *Parker* (3).

The determination of the hours of polling, in particular, has always been left to the decision of the parishioners, and in scarcely two cases have the hours that have been fixed been the same. Lord *Eldon* in *Attorney-General* v. *Newcombe* (4), following *Attorney-General* v. *Forster* (5), expressly declined to lay down rules for future elections.

The trustees and churchwardens rely upon ancient usage. But the ancient usage is, that the parishioners and inhabitants shall decide for themselves in what manner and form the election shall be held.

Sir *H. Jackson*, Q.C., and *Alexander*, for Mr. *Rose*:—

Our case is that the legal owners of the living have presented Mr. *Rose*; that there is no Act of Parliament to define the franchise, who is to exercise it, or how it is to be exercised as to manner, time, or place; and that, under these circumstances, if

(1) 8 D. M. & G. 680. 3 Jur. N.S. 172.
(2) 2 Russ. 101, n., 103, n.
(3) 3 Atk. 576.
(4) 14 Ves. 1, 9.
(5) 10 Ves. 335.

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the Court finds that in substance there has been a fair election, that practically every voter has had an opportunity of voting, it will not disturb the result.

Every attempt hitherto made to disturb an election that has been fairly conducted has failed: *Attorney-General* v. *Forster* (1). In the instance of the *Attorney-General* v. *Rutter* (2), in which the election was declared void, there had been a double return.

Further, if the churchwardens had conducted the election by ballot, it would have been void: *Faulkner* v. *Elger* (3). The mode of election by ballot is bad: *Edenborough* v. *Archbishop of Canterbury* (4).

As to the hours of polling, that must be taken in connection with the number of days, and the Plaintiff cannot mean seriously to contend that the ancient usage of a three days' poll from 8 to 8, being thirty-six hours, would afford the working men less opportunities of voting than a one day's poll from 9 to 9, being twelve hours only.

By the *Metropolis Local Management Act*, notices formerly ordered to be affixed to church doors are directed to be by placard; and the result of *Attorney-General* v. *Rutter* (5) is, that the churchwardens are to "certify the name of the parson who should be elected by a majority of votes"; they are, so to speak, returning officers. Vice-Chancellor *Kindersley*, in *Carter* v. *Cropley* (6), observes: "It is not clear what has been the practice, but it appears that this is necessary, or at all events would be done: the churchwardens, whom I must assume to be the persons to take the initiative, would first call a meeting, and appoint a day for the purpose."

The course thus marked out was strictly followed, and the meeting of the 28th of July, having fixed upon the 30th of August as the day for the election, it was not in the power of the churchwardens to anticipate, divert, or postpone that meeting.

Everitt, and *Edward Ford*, for the trustees and churchwardens:—

The trustees and churchwardens have acted to the best of their

(1) 10 Ves. 335.
(2) 2 Russ. 101, n.
(3) 4 B. & C. 449.
(4) 2 Russ. 93.
(5) Ibid. 101, n., 104, n.
(6) 26 L. J. (Ch.) 249.

ability. Theirs is a most difficult position. The churchwardens have no control over the select vestry, no funds available, no church-rate. They are liable personally for all expenses, and additional polling places would have added to the expenses. Presentation to a living is not an ordinary vestry proceeding, and the Court will not be astute to impute irregularity to men in such a position.

As to the three particular points, upon former occasions the ballot appears to have been resorted to only once; twelve hours has been the most usual daily length, and the period of three days has been the average duration of the poll.

Generally, the principle upon which the Court has acted is—that where the election has been substantially fair, and the majority not likely to be disturbed by any change in the manner and form of voting, it will not interfere: *Ex parte Mawby* (1); *Reg.* v. *St. Mary, Lambeth* (2).

This is the first election since *Carter* v. *Cropley* (3), upon which occasion the churchwardens had the church-rate to fall back upon.

No one has ventured to come forward and say that he, or any body else, was prevented from voting in consequence of any of our arrangements.

Kay, in reply.

There is nothing in the cases to shew that the ballot would have been unlawful if proper precautions had been taken to exclude non-voters. In *Faulkner* v. *Elger* (4) all the Judges said that the objection to the mode of voting by ballot was that there could be no effectual scrutiny; that if it be afterwards objected that a given individual had voted who had no right to vote, it was impossible to say on which side he voted. So in *Edenborough* v. *Archbishop of Canterbury* (5), Lord *Eldon* said that a mode of election could not (except by special contract) be endured which, not furnishing the trustees with the means of knowing who voted for each candidate, did not enable them to ascertain whether they were or were not executing their trust according to the direction of those

(1) 3 E. & B. 718. (3) 8 D. M. & G. 680.
(2) 3 Nev. & Per. 416. (4) 4 B. & C. 449.
(5) 2 Russ. 93, 108.

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who were really their *cestui que trust*. But this description is no longer applicable to the ballot, when fenced round with the precautions prescribed by the *Ballot Act*, 1872 (35 & 36 Vict. c. 33). The resolutions of the 25th of August at least were not illegal.

Then has the conduct of the churchwardens been fair? Was it fair to silence Mr. *Brighty* at the meeting of the 28th of July by promising to take a legal opinion, when they had a legal opinion lying before them which they did not disclose? Was it fair to convene the meeting of the 25th of August, and then refuse to preside at it? Was it fair to declare the meeting of the 30th of August closed as soon as the chairman had announced the days and hours of polling, and to refuse to put Mr. *Brighty's* amendments to the vote?

It is clear that the churchwardens were at first partisans of Mr. *Rose*, that by their proceedings they prevented the parishioners from having the election conducted in the way they wished; their conduct has been neither legal nor fair, and the election must be declared void.

Judgment.

BACON, V.C. (after some preliminary observations, continued):—

The rights of these parishioners have been established long ago by judicial decision. The judgment of Lord *Hardwicke* (1), pronounced in 1776, has, in my opinion, exhausted the subject, and a more clear and, I need hardly say, impartial judgment it is impossible to conceive. The rights of the parishioners are there established, to use Lord *Hardwicke's* words, "upon the foot and words of the trust." The deed creates the parishioners the owners of the advowson. The trustees are appointed only by way of machinery, with no interest, beneficial or otherwise, but with the duty only of carrying into effect the resolutions founded upon the wishes of the inhabitants and parishioners. Before Lord *Hardwicke* there were several questions raised. One seems to have been of a technical kind. It does not appear very clearly from the report, but enough appears to leave no doubt upon the matter, that there had been an objection taken as to some notice which had been served upon the churchwardens, countermanding the intended election. All that, the Lord Chancellor disposed of because he thought it came too

(1) 3 Atk. 576.

late. It was really a technical objection, and he laid it, therefore, out of the case; but the questions which he did consider were—In whom the right of election is? and What are the qualifications of the electors? And this, he added, "tends to the general point of establishing the right by a decree of this Court, and also to the question in regard to Mr. *Doughty*." Then he proceeds with a definition and description of the two words "parishioner" and "inhabitant," upon which I need not now dwell, and concludes that the right is universal in the parishioner and inhabitants. As to the election of Mr. *Doughty*, he says (1), "If according to the right, there is no doubt of it; but suppose it was not according to the right of election, Mr. *Doughty* on the poll had a majority of 286, and on the scrutiny they have gone into no proof as to the merits of the election, or how the majority stood upon the right of the election, and therefore if it had been in the housekeepers paying church and poor rates, I could not set aside the election, as they have not gone into the proof upon the merits, nor turn Mr. *Doughty* out as he is in possession." Then he declines to direct an issue, for the reasons which he gives.

Well, this unfortunate gift—because I consider it was unfortunate—which was made to the parishioners of *Clerkenwell*—this fatal dowry of which they are possessed—has been the source of frequent litigation since that case. The cases before Lord *Eldon* which have been referred to shew that differences of opinion and differences of wishes and views have given rise to litigation in the Court of Chancery, and also in the Court of Exchequer. The matter is canvassed in those judgments, but I do not find it necessary to refer to them more particularly, because I think Lord *Hardwicke's* judgment has exhausted the subject. Though Lord *Eldon*, as was his wont, goes into some very minute circumstances, I do not think that his judgment adds to the principle of the decision, or makes it any clearer than it was left by Lord *Hardwicke*. It only confirms what I have said, that this fatal gift to the parishioners of *Clerkenwell* has been anything but a benefit to them, and has not been conducive to the maintenance of public peace and unanimity upon a subject in which, of all others, there ought to be no animosity or needless difference of opinion. This

(1) 3 Atk. 578.

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unfortunate gift has been like *Pandora's* box, upon the opening of which there issued discords and animosities and evils of all sorts, though nothing in this instance like Hope has remained at the bottom, unless the prospect of an application to the Court of Chancery may be called a hope.

What I have to consider in this case, in the first instance, is whether the proceedings which have been taken are such as the law requires; and I do not hesitate to say that the conduct of the churchwardens, however well intended, or however impartial it may have been according to their ideas of impartiality, has been at least erroneous. The right of the parishioners, after the judgment I have referred to, is not to be questioned. The only way in which that right can be asserted—the only way in which their wishes can be expressed—is by calling public meetings. The churchwardens are the officers upon whom the duty of calling public meetings rests. They have endeavoured to discharge that duty—they have exercised that authority which the law vests in them, and they have called the several meetings which have been referred to.

Now, I am happy to observe that, although great difference of opinion prevails among the witnesses, there is no substantial question of fact at issue. The question is, as Sir *Henry Jackson* has said, a question of law only.

A meeting takes place on the 28th of July. One of the churchwardens, as was right, takes the chair, and the meeting is attended by a very considerable number of the ratepayers of the parish. The churchwardens having called that meeting, the minute book containing the proceedings is put in evidence, and it certainly presents to me a somewhat strange appearance. The notice convening the meeting is read, and then are entered a letter and opinion which had been laid before the churchwardens, but which it is admitted and proved were not communicated to the meeting. To what end the letter and opinion should be entered upon the minutes, unless it was for the purpose of communication to the persons assembled at the meeting, I have not heard a suggestion. Mr. *Paget*, in his examination, said that the letter was addressed to the churchwardens privately; but when afterwards he, in the discharge of his duty as vestry clerk, enters these documents upon

the minutes of the meeting, anybody, without explanation, would conclude that they were read, and that the meeting was apprised of their tenour and effect. But it is admitted that the letter was not read, nor the opinion communicated. The minute goes on to state: It was moved and seconded that Monday, the 30th of August, be fixed for the nomination of candidates, and it was then moved as an amendment that the hour of meeting be seven instead of six o'clock, which amendment was put and carried. It was then moved by Mr. *Brighty*, that there should be only one day's poll, which motion was put and lost. The chairman then intimated that there would be a three day's poll, as usual, which was unanimously agreed to. It was then moved by Mr. *Thompson*, that it be left to the churchwardens to make all necessary arrangements for carrying out the election; and then there was a vote of thanks, and the meeting terminated.

Now, I say again that I can conceive no reason, and certainly none has been suggested, why the advice which the churchwardens had very properly taken from their legal adviser, Mr. *Boulton*, was not communicated to the meeting. Possibly, if it had been communicated, some of the other proceedings would not have been taken. Persons would have been either satisfied or dissatisfied with the suggestions contained in the letter and opinion. No opportunity was given by the churchwardens—who claim for themselves, and who to a certain extent are justified in claiming, the exercise of perfect impartiality and a sincere desire to meet the wishes of the parishioners—of dissenting from the opinion; no mention whatever was made of the letter; and it was resolved that it be left to the churchwardens to make all necessary arrangements for carrying out the election.

From the argument, and still more from what is said by the churchwardens themselves in their examination, and by some of their witnesses, it now appears to have been concluded that, when the meeting once resolved that all necessary arrangements for carrying out the election should be left to the churchwardens, they were to have supreme authority to do whatever they thought fit in the matter. But that is not the construction I put upon the minute of proceedings. Even if the letter of Mr. *Boulton* had been communicated, that is not the construction I should put upon

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the minute. The words do not mean that. They mean that the churchwardens are to regulate the manner of carrying out the election. That is all that they are to do. They are to carry it out still at the wish and will of the parishioners and inhabitants; and it is not in the power of the churchwardens now to say that, inasmuch as the resolution which I have last read was come to, the power of the parishioners and inhabitants to control and regulate the election was exhausted and gone; and that the parishioners could not, to repeat a phrase which has been used, "upset" that resolution. That, moreover, is an after-thought, because the churchwardens did not then take that view of the subject.

At this meeting of the 28th of July, however, Mr. *Brighty* moved a resolution, and it was lost upon a division. The statement in the claim is that "the chairman promised to be guided by precedent, and to take a legal opinion upon the subject, whereupon the motion was negatived," and the evidence establishes that fact.

In considering the impartiality of the churchwardens, I ask, what was the meaning of that? The chairman knew the nature of Mr. *Brighty's* proposition, that there should be only one day's polling from eight till eight. He declined to adopt that, but he promised to be guided by precedent and to take a legal opinion upon the subject, and thereupon the motion was negatived, and it was negatived for that reason.

Then the parishioners, not thinking they had exhausted their powers, presented a requisition to the churchwardens, urging them to call a meeting of the 11th of August, which was accordingly done. The churchwardens, having then a clear sense of their duty, as it seems to me, complied with that requisition, and the meeting was convened and held, at which the two candidates, Mr. *Rose* and Mr. *Holderness*, were present and delivered addresses.

Then a second requisition is signed, and addressed to the churchwardens, and is accepted and acted upon by them, and the churchwardens do, in pursuance of that requisition and in the discharge of their duty, call a meeting for the 25th of August, and the meeting takes place. The requisition is this: "The ratepayers request the churchwardens to call a public meeting to consider, in the interests of the public, the best mode of conducting the forthcoming election for vicar." It then states certain private resolu-

tions which had been carried at the house of Mr. *Von Joel*, and then the churchwardens, in the exercise of their functions, publish an advertisement in these terms: "Pursuant to the above requisition, we hereby convene a public meeting of the parishioners and inhabitants to be held in the parochial schoolrooms, on Wednesday, the 25th of August, at seven o'clock precisely, to consider the questions referred to in the requisition."

Can the churchwardens who have so acted be heard now to say, that the resolutions of the 28th of July, having reposed in them the authority or power to regulate the forthcoming election, there was an end of the matter, and that that could never be altered, when they themselves call two public meetings to consider questions referred to in requisitions of the inhabitants and parishioners?

The meeting is held on the 25th of August, Mr. *Goad* being present, and Mr. *Culver* being absent. Mr. *Goad* declines to take the chair. Another person is appointed to the chair by a regular and proper proceeding, and then resolutions are passed—that the churchwardens be appointed returning officers; that in the event of a poll being demanded it should be taken by ballot; that, as many of the working hands did not leave off till eight in the evening, the hours of polling should be from nine till nine; that there should be a polling-place in each ward to make it as easy as possible for every parishioner to record his vote; that the poll should take place on one day only; that Monday, the 30th of August, should be the day of nomination; and that the resolutions should be forwarded to the churchwardens, and they be requested to carry them out.

Now this was a meeting convened by the churchwardens themselves. Their non-attendance at that meeting did not destroy the validity of the meeting. There was no appearance by them to protest against the resolutions which should then be carried, and no intimation to the parishioners that they did not feel themselves bound, as by issuing that placard they had confessed they were bound, to consider the wishes of the parishioners with respect to the election.

As to the legality or propriety of these resolutions, I have heard no objection, excepting the one urged by Sir *Henry Jackson*, respecting the ballot, as to which I will say a word by and by.

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That it was reasonable to extend the hours of voting nobody can dispute. In a populous parish like *Clerkenwell,* inhabited in a great degree by artisans and working men, it would be at least convenient that they should have some time within which they might exercise their right of voting without doing it at their own expense by breaking off from their work. It is clearly established by the evidence, I think, that with some exceptions, depending somewhat upon the season of the year, eight o'clock is the general hour at which the working men leave off. Therefore, without going into minute considerations, as indeed it would be impossible to give minute consideration to such a topic, it is plainly and upon the face of it consistent with the evidence and reasonable in itself that nine o'clock was a convenient hour up to which the voting places should be kept open.

With these resolutions in their hands, the churchwardens then take the opinion of a learned counsel. Upon what statement that opinion was procured I have no sort of evidence. The case has been called for and has not been produced, and that opinion, as I collect, recommends the churchwardens to ignore the resolutions of the 25th of August. What may be the reason for that I cannot tell. Whether some statements in the case led the learned counsel to come to that conclusion, I do not know. It is not any part of my business or intention to throw any doubt upon the value of that opinion; but I can conceive no reason drawn from the facts, as they are in evidence, why the churchwardens, who had convened the meeting, should ignore what was done at that meeting. Nevertheless, so they did. Then comes the 30th of August, the day of meeting which had been resolved upon on the 28th of July, and then this takes place: The candidates having been heard and a show of hands being taken, a poll was demanded by the friends of Mr. *Rose;* and then it was resolved that the poll should be open until eight o'clock at the vestry hall, *Rosoman Street,* and that such poll should continue for three days as previously arranged. The churchwardens, who had promised to take a legal opinion and who had prevented the meeting on the 28th of July going further than it had gone in consequence of that promise—having taken that opinion—upon this occasion do not communicate the opinion —do not give any information whatever to the persons assembled,

but simply come to the resolution that the poll shall be for the three days as previously arranged, and that is all that takes place, except only this, that the persons whom the present Plaintiff represents were very desirous of having the subject in which they were interested brought before the meeting, and Mr. *Culver* himself in his evidence says that he prevented that. He did it because, he said, their object was, as he knew, to upset what had been done on the 28th of July. Having been furnished with a copy of the intended resolutions—the resolutions which Mr. *Brighty* moved—he says, "I rose from the chair, when Mr. *Brighty* was moving the resolutions, because I thought he was out of order." Why was he out of order? It was a meeting of the parishioners and inhabitants; every parishioner and inhabitant had a right to move anything he liked, and if the resolution was seconded it ought to have been put to the vote. The churchwarden made a mistake, if he thought it was not his duty while he was in the chair to listen to any motion that was made, and to put it when it was seconded. What right had the chairman, by leaving the chair, to put an end to a meeting duly convened? Leaving the chair did not put an end to the meeting. It is said that there was a vote of thanks then moved and seconded, but whether anybody, in the uproar that took place, heard the motion made and seconded, is a matter which is left in considerable doubt. The minute announces that "a vote of thanks having been passed to Mr. *Culver* for his services in the chair, the meeting adjourned." How could the meeting adjourn except upon a resolution? Who moved that the meeting should be adjourned? The meeting did not adjourn, and the entry in the minute book is wholly erroneous. It is not the fact that there was any resolution to adjourn the meeting; on the contrary, the facts proved are that Mr. *Culver*, having left the chair when Mr. *Brighty* was moving, thought that he had put an end to the meeting, and therefore the vestry clerk takes down not a word of what takes place. He stops his pen at that time, and although he knows that other resolutions are being put, and that other proceedings are being carried on, he thinks it not his duty to pay any attention to them, because he was not authorized or required by the chairman to do so. But he had been authorized by the chairman to convene the meeting, and he did convene

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it; he was asked to attend, and he did attend; and to record the proceedings, and he did record them until, either of his own will or by the direction of Mr. *Culver*, or for some other reason which I have not to inquire into, he concluded that the meeting was at an end, which he did as soon as the nomination was effected. Any thing more utterly irregular than that cannot be conceived. Can anybody say that the parishioners and inhabitants, who had come there for the purpose of having discussed, at least, the subject of resolutions which they had transmitted to the churchwardens avowing and announcing their intention, had a fair mode of expressing their wishes? If this Court were to say that the conduct of the chairman was justifiable, it would be constituting the churchwardens owners of this advowson, which is in the hands of the parishioners and inhabitants.

I will not go into the questions which have been so plentifully discussed with regard to the extent to which the churchwardens were partisans or friends of Mr. *Rose*, but it cannot be denied that the conduct of the churchwardens at that meeting did prevent the parishioners and inhabitants, from whom alone they lawfully could take their directions, from expressing their wishes. That, in my opinion, is clear beyond all possibility of doubt. So that, as far as the regularity or legality of the proceedings go, they were wholly illegal and irregular.

But that by no means disposes of the question. There remains the election itself to be considered; and, apprised of this illegality and irregularity as these persons who are interested in the present suit were, what course did they pursue? It was open to them to attend at the election to vote, and to see that nobody voted who was not entitled to vote—in short, to exercise every right which parishioners and inhabitants have in an election. The election goes on, as is proved, in a peaceable, orderly, and quiet manner. The poll is open for three days without objection, without check, without any proceedings being taken which might well have been taken just as readily as at a later period—it goes on and terminates in the election of Mr. *Rose* by a very considerable majority. Well, what is the law that I have to apply to that state of circumstances? Having discharged what I conceive to be my duty, by saying that the conduct of the church-

wardens on the 30th of August was entirely erroneous, and therefore illegal, is it for that reason that I am to set aside the election which has been come to by a very considerable majority of the inhabitants, and in which it has not been shewn or pretended that any man was prevented from voting, or that any obstacle or difficulty was presented to his voting? In my opinion, that is not the law as Lord *Hardwicke* laid it down in *Doughty's Case* (1),—that is not the law as was most distinctly decided in the two cases which were mentioned to me yesterday by Mr. *Everitt* in the course of his argument. [His Lordship referred at some length to the two cases of *Reg.* v. *Parishioners of St. Mary, Lambeth* (2), and *Ex parte Mawby* (3), and with respect to the latter observed:—] That was a case upon mandamus, but the principle of law is exactly the same there as here. If upon the evidence in this case there had been any such proof as seems to have been required in the two cases at common law, and which would be required in any case to establish a grievance, such as to justify the complaint and to authorize the administering of the relief which this statement of claim calls for, it must be shewn that there has been some wrong done to the persons on whose behalf the Plaintiff claims; and upon that subject there has not been a particle of evidence. There is some reason to believe that scrutineers were appointed—whether they were or not I do not know distinctly, and I need not inquire; but on the authority of those two cases to which I have referred, and still more, on the authority of *Doughty's Case*, before Lord *Hardwicke*, I am of opinion that I can grant no relief upon this action. That the ratepayers and inhabitants have been prevented from exercising their right of having the votes at the election taken by ballot and at various polling places, I do not doubt. But that is all that they were prevented from doing, and their right of voting at the election of the clergyman they were not prevented at all from exercising. It seems that some of them have declined to vote. I do not know what motives may have induced these persons not to vote, or what proceedings they may have contemplated at that time; but there is no particle of evidence that justifies me in coming to the conclusion that their

(1) 3 Atk. 576. (2) 3 Nev. & Per. 416.
(3) 3 E. & B. 718.

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abstention from voting entitles the Plaintiff to the relief he now asks, because, although he could not exercise the right *modo et formâ* according to his own wishes, he had the opportunity of exercising it abundantly and plentifully in another manner and form, and might have exercised it peaceably without any kind of interruption.

Well, now I have a few words to say upon what formed the subject of Sir *Henry Jackson's* argument, when he said that if this relator—I call him by that name as it is a more familiar word—and the persons who concur in his views, had had their own way and had established an election by ballot, it would have been wholly an illegal election. I cannot follow that at all, and having attended to the authorities which were referred to, I cannot find anything to justify that assertion. *Faulkner* v. *Elger* (1) only decides that an election by ballot is not legal because it does not afford the opportunity for a scrutiny, and Lord *Eldon* is of the same opinion, though he seems to have hesitated very much about it. But he refers to the fact that there are societies and institutions in this country in which for centuries past the mode of election by ballot has been practised; so that it is common enough. Acts of Parliament regulating municipal and parliamentary elections which have introduced voting by ballot, have at the same time introduced regulations which have freed voting by ballot from the objections which were felt in *Faulkner* v. *Elger*. Now you can trace with perfect accuracy by the machinery which is adopted the persons who vote, and everything that is necessary to ensure the validity of the vote. Is it unreasonable that the parishioners of *Clerkenwell*—not intending to adopt those statutes as statutes—not insisting that the statutes give them any right—should adopt these "organic changes," or, as we may call them, these improvements which have been made in our generation? Finding that there has been invented a more useful and efficacious mode of secret voting than that which their forefathers practised, they say, "We choose to adopt the ballot." In my opinion there was nothing invalid in the resolution that this election should be carried out by ballot. When it is said that the ancient custom and usage of this parish has been to have open polling, I do not

(1) 4 B. & C. 449.

find sufficient foundation for that statement. There is no ancient custom which imposes it, or which amounts to a binding authority upon the parishioners at this day. They are as free as their ancestors were to prescribe regulations as to the mode of voting, provided they are lawful. They are free to say that although a custom or habit prevailed 100 or 200 years ago of electing in a particular way, they are satisfied that is not now a judicious mode of exercising their rights, and therefore they will resolve to exercise them in a different way.

Being, therefore, of opinion that the resolutions which were proposed on the 30th of August, and which were intercepted by the wrongful act of the churchwarden who rose from his chair when the motion was being made, ought to have been put, and that the conduct of the churchwarden was wholly erroneous, I think that the election which afterwards took place was open to objection; but I think, nevertheless, that the election having taken place, and there being no evidence whatever that it was improperly conducted, or that any voter was prevented from recording his vote, the present action must be dismissed. I cannot, however, dismiss it with costs. I cannot dismiss it so as to give costs to the churchwardens, who, in my opinion, have not discharged their plain duty properly. I cannot give the trustees costs, because they have taken part with the churchwardens, and have thrown in their lot with them. Nor can I give costs to Mr. *Rose*. If he had relied on the validity of his election, well and good. He might have done that; but he has made himself a partisan in the discussion of this matter, the legality of which I have been considering, and against the legality of which I have decided. Therefore I can make no order as to costs.

The judgment is that this action be dismissed without costs.

Solicitors for Plaintiff: *Rooks, Kenrick, & Co.*
Solicitors for Defendants: *Boulton & Sons.*

V.-C. B.

1876

June 23, 27.

EARP *v.* HENDERSON.

[1875 E. 1a.]

Practice—Pleading—Form of Reply—Joinder of Issue—Plea in Nature of New Assignment—Erroneous Form—Rules of Court, 1875, *Orders* XIX., *rr.* 2, 4, 14; XXIV., *rr.* 2, 3; XXV.; XXIX., *r.* 12; XXXVI., *r.* 3; *Forms of Pleading, Nos.* 6, 9.

A reply, which begins by joining issue with Defendant in his defence, and then goes on to confess and avoid, is erroneous in form; the frame of the Form No. 6, "Reply," in the 1st schedule, Appendix (C), to the *Judicature Act*, 1875, notwithstanding.

Where, after statement of claim, and defence, Plaintiff replied, joining issue on the defence, and then pleading in confession and avoidance, and the Defendant took no further step till long after notice of trial had been served;

Leave was, under the powers of the Court for extending time, given to the Defendant, to join issue on the second pleading in the reply.

Statement.

TRIAL OF ACTION.

A writ was issued on the 1st of November, 1875, by *William Earp*, against *Alexander Henderson*, and the statement of claim, dated the 26th of November, 1875, stated that, by an agreement dated the 22nd of October, 1867, *Earp* agreed to let, and *Henderson* agreed to take, the *Prince of Wales' Theatre, Liverpool*, for a term of ten years from the 1st of January, 1876, at an annual rent of £1050.

On the same day the following letter was written by *Henderson* to *Earp*:—

"*London*, 22 Oct., 1867.

"To Mr. *William Earp*, of *Eastbourne*.

"Sir,—In consideration of your granting me a lease for ten years of the *Prince of Wales' Theatre, Clayton Square, Liverpool*, commencing the 1st day of January, 1876, I agree, in the event of my selling or disposing of the said lease with your sanction, to pay to you one half of the amount I receive for the same.

"(Signed) *Alex. Henderson.*"

In June, 1873, *Earp* sold the theatre to *John Henry Addison*; and by an indenture dated the 9th of April, 1874, it was witnessed

that, in consideration of a sum of £500, *Henderson* surrendered to *Addison* all his estate and interest in the theatre and lease. The deed was duly executed by *Henderson;* and indorsed on it was a receipt for £500, signed by *Henderson.*

The claim alleged that by the letter of the 22nd of October the Defendant constituted himself a trustee for the Plaintiff of one half of the amount which *Henderson* might at any time thereafter receive for his estate and interest in the theatre; that £500 had in fact been received by the Defendant from *Addison* in respect of the Defendant's interest in the theatre; that, notwithstanding repeated applications, the Defendant refused to pay one half of the £500; and claimed a declaration that the Defendant was a trustee for the Plaintiff for £250, and an order upon the Defendant to account for and pay the said sum to the Plaintiff, with interest.

On the 22nd of December, 1875, the Defendant *Henderson* delivered a statement of defence, in which he admitted the agreement stated in the statement of claim, and admitted his liability to account to the Plaintiff for one half of the net amount he had received for the lease, but said that he had received the sum of £350 only, which sum was subject to the deduction of costs incurred by him, the Defendant, in certain Chancery proceedings which he had caused to be instituted for recovering the purchase-money, amounting to £37, leaving the net sum received by him £311; and that he was willing to pay to the Plaintiff, and "had paid" into Court £155 10*s.*, being one half of such net amount.

In answer to interrogatories filed on the 10th of January, 1876, the Defendant admitted that he executed the indenture; could not, from his belief or otherwise, say whether a receipt by him for £500, or any sum, was indorsed thereon; said he had not received £500, but that he had received £350 by way of compromise of the claim; and admitted that he was trustee for the Plaintiff of the sum of £155 10*s.* The Plaintiff replied on the 10th of February, 1876, in the following terms:—

"The Plaintiff joins issue with the Defendant on his defence.

"The Plaintiff says that if the Defendant only received £350, as in the statement of defence mentioned, it was because the said *Henry John Addison*, in the Plaintiff's claim mentioned, claimed from the Defendant damages for breach by the said Defendant of

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an agreement made between the said Defendant *Alexander Henderson*, and the said *John Henry Addison*, with respect to the said *Alexander Henderson's Lydia Thompson Burlesque Troup*, performing at the *Prince of Wales' Theatre, Liverpool*, and as a compromise of such claim the said Defendant allowed the said *John Henry Addison* to set off or deduct from the said sum of £500 the sum of £150 in discharge of the liability of the said Defendant to the said *John Henry Addison*.

"The Plaintiff has nothing to do with the said liability so compromised as aforesaid, and claims the moiety of the said sum of £500."

On the 23rd of February, the Plaintiff gave notice of trial of the action; and on the 16th of June, the Defendant took out a summons for the 19th, that he might be at liberty to deliver to the Plaintiff's solicitor a joinder of issue upon the Plaintiff's reply.

The trial of the action and the summons were set down to be heard together, and the summons was taken first by way of appeal from the Chief Clerk's decision, which had been in favour of the Defendant.

Argument.

Cookson, Q.C., and *H. B. Howard*, for the Plaintiff:—

By the 12th rule of Order XXIX., if any party does not deliver any subsequent pleading within the period allowed for that purpose, the pleadings are to be deemed to be closed, and the statements of fact in the pleading last delivered are to be "deemed to be admitted." Here there has been no pleading subsequent to our reply of the 10th of February. Hence, the statements in our reply must be admitted.

By rule 2 of Order XXIV. no pleading subsequent to reply, "other than a joinder of issue," is to be pleaded without leave of the Court. The exception shews that the Defendant might, within four days of our reply, have joined issue without the leave of the Judge; whereupon, by Order XXV., the pleadings would have been deemed to be closed. As he did not do this, we rely upon rule 12 of Order XXIX.

No doubt the Court has power to extend the time of pleading. But will the Court do this in this instance? The Defendant takes out this summons on the 16th of June, months after the expiration

of four days from our reply of the 10th of February, just as we are on the eve of trial. The Court will consider the inconvenience of having a new issue tendered by the Defendant four months after the time when, according to the regular practice, the pleadings have closed. The Defendant is entitled to no indulgence.

There is only one statement of fact which is really material, and upon which it is presumed issue need be joined. The Defendant admits the agreement, and admits his liability to account; but says he has only received £350. Upon that we join issue; and the effect of joining issue is that the pleadings are closed, and the Plaintiff is bound by our statement as to why he received only £350, namely, that £500 was handed over to him for the lease, and that he had to pay back £150 on another account.

If this summons be granted, the Court will be depriving the Plaintiff of the benefit of Order XXV. and of rule 12 of Order XXIX.

Kay, Q.C., and *Russell Roberts*, for the Defendant:—

The Plaintiff must first justify his own pleading. He delivers a reply in which he begins by joining issue, which is now, under the new practice, in all the Courts alike, a general traverse; and then he goes on to confess and avoid. That is a double pleading which, under the old practice, would, according to *Stephen* on Pleading (1), have been bad for duplicity; and the old practice is kept still in force by sects. 23 and 76 of the *Judicature Act*, 1873, and sect. 21 of the Act of 1875.

Under sect. 87 of the *Common Law Procedure Act*, 1852 (15 & 16 Vict. c. 76), there were instances in which a Plaintiff might plead one new assignment; and for this an amendment of the statement of claim is by rule 14 of Order XIX. now substituted.

The Plaintiff here has not amended his statement of claim; but he comes to the Court and says: "You have not made any further pleading, you have admitted the truth of my second plea; the pleadings are closed, and there is an end to your case." But the answer is: "Upon which part of your reply do you rely? Upon the first, which denies that the Defendant received only £350? or upon the second, which admits it?"

(1) 7th Ed. p. 317.

V.-C. B. 1876 — EARP v. HENDERSON. — Argument.

In addition to this argument that the Plaintiff's pleading is a bad one, we have armed ourselves with this summons. No doubt we are out of time; but the Court has the fullest discretion to extend time; and we scarcely doubt that the Court will give the Plaintiff this opportunity. One never expects to find pleading in a reply, or, as it used to be called, a replication.

In *Gillott* v. *Ker* (9th of March, 1876) the Master of the Rolls held that default by a Defendant in pleading was not an admission within rule 12 of Order XXIX.

The words of rule 12 of Order XXIX. are, "within the period allowed for that purpose." That is not this case. The rule does not say that a bad reply, if not subsequently pleaded to, is to be deemed the close of the pleadings.

Order XXV. says that as soon as either party has joined issue "simply"—"without adding any further or other pleading thereto" the pleadings are to be closed. But has this Plaintiff joined issue "simply?" and "without adding any further or other pleadings?" Certainly not. Then the pleadings are not closed. But by rule 3 of Order XXXVI. the Plaintiff may at any time "after the close of the pleadings" give notice of trial. So that the Plaintiff's notice of trial has not been given after the close of the pleadings, and is bad; and the Defendant, under Order XL., rule 1, is entitled to move for a nonsuit.

Cookson, in reply:—

The two arguments cannot consist—one founded on the contention that the pleadings have closed, the other on the contention that they have not closed.

The old cobwebs about double pleas have all been swept away by the provisions of Order XIX. The rules of that Order do not confine the Plaintiff to a simple joinder of issue.

In the case before the Master of the Rolls all that was decided was that the Court would not make an interlocutory order founded on a default of pleading.

Judgment.

BACON, V.C.:—

The case is of some importance, as tending to illustrate what the present improved practice means.

(1) W.N. (1876) 116. (2) W.N. (1876) 116. (3) W.N. (1876) 116. (4) W.N. (1876) 116. (5) W.N. (1876) 116. (6) W.N. (1876) 116. (7) W.N. (1876) 116. (8) W.N. (1876) 116. (9) W.N. (1876) 116. (10) W.N. (1876) 116. (11) W.N. (1876) 116. (12) W.N. (1876) 116. (13) W.N. (1876) 116. (14) W.N. (1876) 116. (15) W.N. (1876) 116. (16) W.N. (1876) 116. (17) W.N. (1876) 116. (18) W.N. (1876) 116. (19) W.N. (1876) 116. (20) W.N. (1876) 116. (21) W.N. (1876) 116. (22) W.N. (1876) 116. (23) W.N. (1876) 116. (24) W.N. (1876) 116. (25) W.N. (1876) 116. (26) W.N. (1876) 116. (27) W.N. (1876) 116. (28) W.N. (1876) 116. (29) W.N. (1876) 116. (30) W.N. (1876) 116. (31) W.N. (1876) 116. (32) W.N. (1876) 116. (33) W.N. (1876) 116. (34) W.N. (1876) 116. (35) W.N. (1876) 116. (36) W.N. (1876) 116. (37) W.N. (1876) 116. (38) W.N. (1876) 116. (39) W.N. (1876) 116. (40) W.N. (1876) 116. (41) W.N. (1876) 116. (42) W.N. (1876) 116. (43) W.N. (1876) 116. (44) W.N. (1876) 116. (45) W.N. (1876) 116. (46) W.N. (1876) 116. (47) W.N. (1876) 116. (48) W.N. (1876) 116. (49) W.N. (1876) 116. (50) W.N. (1876) 116.

The 14th rule of Order XIX. provides that no new assignment shall be pleaded. Everything which formerly was alleged by way of new assignment is now to be introduced by way of amendment of statement of claim, so as to give the Defendant an opportunity of meeting the case made by the new assignment.

In this instance I cannot doubt that the reply which has been delivered by the Plaintiff is not a right form of pleading. It is in effect an amendment of his statement of claim. It amounts to a statement of this kind: "I have one ground of claim; but if that should fail me, then I have another."

The Defendant admits the agreement, but denies having received the amount. Thereupon the Plaintiff joins issue upon that plea, and states a new case which he desires that the Defendant should have no opportunity of meeting, because the rules of the Court have said that the statements of fact contained in the pleading last delivered shall be taken as admitted.

But the Court has its own powers of enlarging the time appointed by the Rules for doing any act or taking any proceeding, upon any terms that the justice of the case may require; and in the exercise of that power I enlarge the time given by the Rules to the Defendant to join issue upon the Plaintiff's reply.

Kay, Q.C. :—But does your Lordship allow the Plaintiff to go on? We submit that he should be nonsuited.

BACON, V.C. :—I will not, in place of the gossamer net in which you say the Plaintiff is attempting to entangle you, envelop him in an iron net from which he will have no power of escaping.

The Plaintiff has a right to amend his statement of claim. If Mr. *Cookson* relies upon the new "count," as I may call it, contained in his reply, the Defendant asks for an opportunity of meeting that. In my opinion, he is entitled to such opportunity; and under the power contained in rule 6 of Order LVII., I accordingly enlarge the time for the Defendant's joinder of issue.

Cookson, Q.C. said that the Defendant might have done this within four days after reply without the leave of the Court; and asked for the costs of the summons.

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Bacon, V.C.:—I reserve the costs of the summons for the present.

The Plaintiff thereupon elected to go on with the case, issue being joined on the last plea contained in the reply—namely, that if Defendant received £350 only, it was because Defendant allowed *Addison* to set off against the £500 the sum of £150 in discharge of another liability.

Evidence was gone into, the result of which, in the view of the Court, was, that there was nothing to shew that the £350 paid to *Henderson* was not paid to him solely as the purchase-money for the lease, or that the liquidation of any claim which *Addison* had against *Henderson* entered into the money settlement of the transaction.

Argument.

Cookson, Q.C., and *H. B. Howard*, for the Plaintiff, referred to Tudor's Leading Cases (1); *Lupton* v. *White* (2); *Cook* v. *Addison* (3).

Kay, Q.C., and *Russell Roberts*, for the Defendant.

Cookson, in reply:—

The pleading in this case, which has been so severely commented on, is in the form suggested by the framers of the *Judicature Act*, 1875, themselves: First Schedule to Act of 1875; App. (C), Form No. 6, "Reply."

Judgment.

Bacon, V.C.:—

Several matters have been discussed in the course of this argument.

The first to which it is necessary to refer is the question of pleading. I have already done my best to give my reasons for holding that the reply which has been delivered in this case is an erroneous mode of pleading.

(1) Page 370. (2) 15 Ves. 432.
(3) Law Rep. 7 Eq. 466.

Mr. *Cookson* refers me to the Forms which are attached to the *Judicature Act*, in which he sees a statement made of something which had no place in the Plaintiff's original statement of claim.

But in looking through a volume in which these statutes, rules, and orders are printed (1), I find the following note appended to the form of Reply, No. 9, "The facts stated in this reply should, in general, be introduced by amendment into the statement of claim."

That is a most wholesome note, and one which ought always to be regarded. If it had been regarded in this case, no part of the costs of joining issue on this reply, which is practically a new assignment, would have been incurred.

In my view the pleading is erroneous. If any case should occur in which such another pleading should be delivered, it may become necessary to deal with such a case. For the present, it is enough to say that this is erroneous.

The Plaintiff, however, submits to the Defendant joining issue with him in the second, or new, plea raised by the reply—namely, that if the Defendant received only £350, it was because *Addison* claimed from him £150 damages for breach of another agreement, and as a compromise of such claim the Defendant allowed *Addison* "to set off or deduct" from the £500 the sum of £150.

That is the new issue which the Plaintiff takes upon himself the burden of proving. [His Lordship then discussed the evidence, and continued:—]

In my opinion there is nothing to justify any such conclusion. The agreement alleged to have been broken had nothing to do with the purchase. I consider it proved that £350, and no more, was paid by *Addison* to *Henderson* as the consideration for the purchase of this lease.

The Plaintiff's case, therefore, wholly fails, and the claim must be dismissed.

Kay, Q.C., observed that, under rule 4 of Order xxx., the Plaintiff knowing, as from the statement of defence he must, on the 22nd of December, 1875, have known, that a sum had been paid into Court, might within four days have accepted the same in satisfaction of his claim, with liberty to tax his costs, and in

(1) Wilson, p. 348.

(2 WN (1875) Pt II. 354

V.-C. B. 1876 EARP v. HENDERSON.

case of non-payment within forty-eight hours, to sign judgment for such costs.

Not having done this, he ought to pay the costs of the suit, at least from the date of delivery of the statement of defence.

BACON, V.C., said that the Plaintiff had failed, and must pay all the costs of the suit. He was entitled, of course, to take his money back out of Court.

Kay, Q.C., asked for the costs of the summons, on the ground that the Defendant had succeeded on this also.

BACON, V.C., said that the Defendant's delay had been wholly unexplained, and he could give him no costs of the summons. As to these costs, there would be no order; the rest would be paid by the Plaintiff.

Solicitors for Plaintiff: *Combe & Wainwright.*
Solicitors for Defendant: *Rooks, Kenrick, & Co.*

V.-C. B. 1876 *June* 24.

In re SPEER'S TRUSTS.

Lands Clauses Act—Application of Purchase-money—Lateral Permanent Improvements—Enlargement of Dwelling-house.

Purchase-money of part of a settled estate paid in under the *Lands Clauses Consolidation Act* ordered to be applied towards the cost of lateral additions to a house, part of the settled estate.

Statement.

PETITION.

By the will, dated the 10th of December, 1840, of *William Speer*, who died in 1844, certain copyhold hereditaments, held of the manor of *Fulham, Middlesex*, and certain freehold hereditaments in the city of *Westminster*, were devised in a line of strict settlement, under which *Hannibal Speer* (formerly *Sandys*) was entitled as tenant for life in possession, with remainder to his first and other sons in tail male, remainder to his brother *Edward Frederick Sandys* for life, remainder to the use of the first and other sons of *Edward Frederick Sandys* in tail male, with divers remainders over.

V.-C. B. 1876 *In re* SPEER'S TRUSTS.

Statement.

Hannibal Speer had never been married. *Edward Frederick Sandys* had three infant children, two daughters and a son.

Part of the copyhold property had been taken by a railway company, and the proceeds of sale were in Court.

Hannibal Speer, *Edward Frederick Sandys*, his three infant children, and other persons interested under the limitations of the settlement, now presented a petition, stating that part of the freeholds in *Westminster* consisted of a freehold house, No. 1, *Park Prospect*, near *Storey's Gate*. This house was formerly occupied with No. 2, *Park Prospect*, from which it was now detached. No. 1 was well situated, fronting towards the north on *St. James's Park*, but had limited accommodation and inferior kitchen offices, and was approached down a side entrance, exposed to the weather. It had no windows facing to the south in *Great Queen Street*, from which it was separated by a yard or garden, formerly let with No. 2. On this yard or garden it was proposed to erect a kitchen, scullery, larder, store-room, and beer-cellar, with a proper area to light the same, on the basement, a dining-room with entrance hall and portico in *Great Queen Street*, together with a bed-room, lavatory, and other conveniences on the first floor, and another bed-room on the second floor. The effect would be to convert No. 1 from an inadequate and ill-arranged house into a first-class residence, which it was estimated would yield a return of £6 per cent. on the outlay, as rent.

They asked for the application of a competent part of the fund in Court towards the execution of these works, which had been contracted for, subject to the leave of the Court being obtained.

Argument.

Phear, for the Petitioners:—

The infancy of some of the Petitioners renders the application necessary.

This is not a case of repairing, which it is the duty of the tenant for life to do; it is that of permanent improvement by the enlargement of a house by buildings erected upon adjoining land: *In re Leigh's Estate* (1); *Drake* v. *Trefusis* (2).

Macnaghten, for the Railway Company.

(1) Law Rep. 6 Ch. 887. (2) Law Rep. 10 Ch. 364.

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In re SPEER'S TRUSTS.

Judgment.

There seems to be nothing to be said against this application.

The case appears to be covered by the decisions that have been referred to, especially *Drake* v. *Trefusis* (1).

In erecting new buildings, you are not repairing, you are doing something whereby a permanent increase of rent may be expected.

I think the application may be granted.

Solicitors: *Trollope & Winckworth; Hargrove, Fowler, & Blunt.*

V.-C. B.

1876

July 6.

In re EAST INDIA COTTON AGENCY.

FURDOONJEE'S CASE.

Company—Insolvency of Shareholder—Winding-up—Order of Discharge under Indian Act—Liability of Shareholder not a Proveable Debt—Contributory.

18 Ch D 643

Shares in an English company were taken by a resident at *Bombay*, who became insolvent. Afterwards the company was ordered to be wound up. The debtor subsequently obtained an order of discharge under an Indian Act:—

Held, that the liability of the insolvent in respect of the shares was not a debt proveable in the insolvency proceedings; hence that it was not barred by the order of discharge; and the name of the late insolvent was ordered to be placed on the list of contributories.

Statement.

MOTION.

The *East India Cotton Agency Company, Limited*, was registered in *England* in 1861 under the *Joint Stock Companies Act*, 1856 (19 & 20 Vict. c. 47).

Amongst other shares allotted in *India*, 100 shares were, in or about 1863, allotted to *Ardáseer Cursetjee Furdoonjee* of *Bombay*.

The names of the Indian shareholders were registered in a book kept at the office at *Bombay*, but not in the books at the *London* office; and no return of their names was made to the Registrar of Joint Stock Companies.

On the 12th of October, 1866, at a meeting of the creditors of *A. C. Furdoonjee*, held at *Bombay* under the provisions of

(1) Law Rep. 10 Ch. 364.

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the Act XXVIII. of 1865 of *India*, it was resolved that his estate be wound up under the management of trustees; and by an order of the High Court of Judicature at *Bombay*, dated the 13th of October, 1866, it was ordered that the resolutions be confirmed, and the estate be wound up under management accordingly.

Statement.

In the statement of the debtor's assets and liabilities, these shares were mentioned as involving a possible liability against his estate.

On the 29th of July, 1867, the company was ordered to be wound up.

On the 10th of October, 1868, the debtor obtained his order of discharge.

This was a motion on behalf of the official liquidator that the name of *A. C. Furdoonjee* be placed on the B list of contributories for 100 shares.

Argument.

Kay, Q.C., and *Owen*, for the official liquidator:—

The question is whether the shareholder, by reason of his bankruptcy in *India*, is discharged from being a contributory. In *Sands' Case* (before *Bacon*, V.C., March 18, 1875), the Court decided that the Indian shareholders in this same company were bound to contribute to the debts, and that they were not a different class from the English shareholders.

In the case of an English bankruptcy, it is now well settled that it is in the bankruptcy only of a "contributory," *i.e.*, of a shareholder who has become bankrupt since the winding-up, that future calls can, under sect. 75 of the *Companies Act*, 1862, be proved for: *Financial Corporation* v. *Lawrence* (1).

The only question is, whether the *Indian Bankruptcy Act* makes any difference (2). The provisions of the Indian Act do

(1) Law Rep. 4 C. P. 731.

(2) Sect. 24 of the Act No. XXVIII. of 1865, being "An Act to provide for the more speedy Liquidation of Insolvent Traders' Estates in *Bombay*," is as follows:—

"24. Such order of discharge shall operate to discharge the trader, and all property and effects acquired by him subsequent to the filing of the order herein first mentioned" (viz., the order of Court to vest the trader's estate in trustees), "from all debts, claims, or demands in respect of the transactions included in the account filed by the trustees, and no suit shall thereafter be maintainable against the said trader, nor shall such after-acquired property and effects be liable to be attached or taken in execution, in or under the order of any Court in *British India*, in respect of such transactions."

Effect of order of discharge.

(4 Sch. W.C. 1875) 66.

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Argument.

not appear to be wider than those of the English statute (32 & 33 Vict. c. 71, ss. 48–50).

E. Cooper Willis, for *A. C. Furdoonjee*:—

If this had been an English bankruptcy, there would have been nothing to prevent the official liquidator from taking the order.

But here the contract was made in the first instance in *India;* the whole transaction was carried out there; and if by the law of *India* the debtor has become exonerated from all liability in respect of these shares, the Court has no power to make any order against him.

Now in the case of *Punnett* v. *Vináyak Pándurang* (1), where (as here) the proceedings in insolvency began before the winding-up, it was held, on the 16th of March, 1872, that the trader, having obtained his order of discharge, was not liable for calls made after the date of the order.

The case was heard on appeal by *Westropp,* C.J., and *Lloyd,* J.; and the Chief Justice, in delivering judgment, said that the question turned on the construction of the Indian Statute. He observes: "The only question that remains to be considered is the effect of section 24 of Act XXVIII. of 1865. Is a call which is made after the insolvent trader's discharge a liability from which he is protected? That section enacts that the order of discharge shall operate to discharge the trader, and all property and effects acquired by him subsequent to the filing of the order therein first mentioned, from all debts, claims, or demands in respect of the transactions included in the account filed by the trustees. It is clear that the trader personally, and his effects acquired subsequent to the vesting order, are protected from debts mentioned in the final account; but the difficulty arises on the meaning of the word 'transactions.' It is admitted that the contingent liability in respect of these shares is not in so many words mentioned in the final account; but it has been seen that the liability of a shareholder within the meaning of section 75 of the English *Companies Act* is a liability incurred by him on becoming a member of the company. His liability is a liability in respect of the contract he thereby enters into, and does not merely arise when a call is made to enforce that contract. That being so, the

(1) Bombay High Court Reports, vol. ix. p. 27, 31.

'transaction' in respect of which the liability arises is the contract the trader entered into with the company when he became owner of these shares." His Lordship then observes that though this contract was not specifically mentioned in the final account, it was substantially included within it; and proceeds: "If they" (the trustees) "have substantially included in their account the contract made by the insolvent, in mentioning payments made by them in respect of that contract, we think that is sufficient to protect the insolvent trader. To hold otherwise would be to defeat the intention of the Legislature." Accordingly, their Lordships affirmed the decision of the Court of first instance, whereby the name of the trader, upon whom a call had been made, was ordered to be struck out of the list of contributories.

In this case the contract to take shares is mentioned in the final account of the debtor, where it appears as one of the liabilities.

Kay, Q.C.:—The decision of the High Court of *Bombay* proceeds upon the view that the debt was proveable.

BACON, V.C.:—I do not see how the liability could have been a proveable debt. What value could possibly have been set upon this liability at the commencement of these proceedings? Where are the shares at this moment?

Willis:—The trustees hold them. As to the liability, it will be remembered that by sect. 31 of the *Bankruptcy Act*, 1869, all liabilities, present or future, certain or contingent, to which the bankrupt is "or may become" subject, are to be deemed proveable debts. Rightly or wrongly, the Judges in *India* have held that such a liability as this is a proveable debt.

Kay, in reply:—

The reasons given by the Chief Justice at *Bombay* for the decision of the Court are, in fact, conclusions of English law, as they are to be found in *Lindley* on Partnership (1) and other works. But we know the conclusions of English law to be exactly contrary to that which was arrived at by the Judges in *India*.

(1) 2nd Ed. (1867) p. 1161.

V.-C. B. 1876 FURDOONJEE'S CASE. Judgment.

BACON, V.C.:—

I do not see how this liability could have been a proveable debt at the time when these insolvency proceedings commenced. There was no *constat* that there ever would be a call on the shares. This is an English company, and I am relieved from the difficulty of appearing to differ from a decision of the High Court of *Bombay*, which seems to have proceeded upon the Indian Statute.

But for what may have been held to be the construction of that statute, I am at a loss to understand how the official liquidator could have gone in under an Indian bankruptcy, and have proved for that which at the date of the bankruptcy must have been an amount incapable of being valued or estimated.

I think the name of this shareholder must be placed on the list.

The costs of all parties will come out of the estate.

Solicitors: *Harper, Broad, & Battcock; Chauntrell, Pollock, & Mason*, agents for *Prescot & Winter, Bombay.*

BIZZEY *v.* FLIGHT.

V.-C. H.

1876

April 1

[1874 B. 222.]

Incomplete Settlement—Confirmation by Will—Effect of—Non-admission of Settlement to Probate.

Where a settlement, incomplete as to part of the property comprised in it, is subsequently confirmed by the will of the settlor, the confirmation perfects the settlement, but as a testamentary instrument, so that the doctrines of ademption and lapse apply.

R. H., by a voluntary settlement, assigned to trustees several mortgage debts, certain shares in a bank, and some furniture, and directed the trustees to hold the premises and certain consols which had been previously transferred to them, upon trust for herself for life, and then, as to part of the trust premises, for specified beneficiaries; and as to the residue, for *M. F.*

M. F. died in the lifetime of the settlor, who in her lifetime received some of the mortgage debts (the others being received by the trustees), and died without having duly transferred the bank shares, but having by her will confirmed the settlement. The settlement being valid as to the consols, the mortgage debts received by the trustees, and the furniture, but incomplete as to the mortgage debts received by the settlor, and the bank shares:—

Held, that the confirmation could not operate as to the mortgage debts received by the settlor; but that, notwithstanding that the settlement had not been admitted to probate, the confirmation of it by the will, which had been proved, perfected the settlement with regard to the bank shares as a testamentary instrument, and operated as a specific bequest of them; and that the shares therein of *cestuis que trust* under the settlement, who predeceased the settlor, lapsed in favour of the residuary legatee under this will.

Observations on *Sheldon* v. *Sheldon* (1).

Statement.

REBECCA HODGES, by a voluntary settlement dated the 5th of February, 1850, after reciting a transfer of a sum of consols to the trustees of the settlement, assigned to them certain sums of money secured on six several mortgages, and certain shares in the *Gloucestershire Banking Company*, and certain furniture and effects respectively specified in a schedule to the deed, and all deeds, writings, and securities whereby the same were secured; and for the better enabling them to recover the said moneys, she constituted the trustees her attorneys; and she directed them when and as any of the principal moneys comprised in the mortgage securities were paid off to invest the same, and,

(1) 8 Jur. 877.

V.-C. H. 1876 BIZZEY v. FLIGHT. Statement.

during her life, to pay the dividends and interest thereof, and of the other settled property to herself, and to permit her to use and enjoy the furniture and effects. And after her death to hold the trust fund upon trust to invest and pay certain sums of money, part thereof, in trust for specified *cestuis que trust;* and as to other sums, part thereof, for specified charities; and as to the residue of the trust moneys, upon trust to pay the same to *Martha Flight*, her executors, administrators, and assigns; and as to the furniture and effects thereinbefore assigned and not included in the aforesaid trusts, upon trust, after the decease of *Rebecca Hodges*, to deliver the same unto the said *Martha Flight*, her executors, administrators, and assigns.

By her will, dated the 9th of July, 1860, *Rebecca Hodges* said: "I confirm the settlement I have made by deed dated the 5th day of February, 1850, of certain portions of my property;" and thereby, and by several codicils thereto, she made divers pecuniary, and a residuary bequest.

Martha Flight died before *Rebecca Hodges*. The properties comprised in the six mortgages were not transferred to the trustees of the settlement, and *Rebecca Hodges* retained in her own possession the securities for the mortgage debts, and the certificates of the *Gloucestershire* bank shares included in the settlement, and she died on the 25th of March, 1874, having in her lifetime received the moneys due upon some of the mortgages, and without having executed any legal transfer of the *Gloucestershire* bank shares, which, under the deed of settlement of the company, could only be transferred in a prescribed form. The moneys due on the remaining mortgages were received by the trustees of the settlement.

The settlement was not itself admitted to probate, which was passed of the will containing the reference aforesaid and of the codicils.

This suit having been instituted by the surviving trustee of the settlement and the will for administration of the trusts of the settlement, and if necessary, also of the trusts of the will, the Vice-Chancellor, at the hearing on the 21st of March, held that the settlement was valid and complete as to the consols transferred to the trustees, as to the mortgage debts received by

the trustees, and as to the furniture and effects, but was incomplete as to the mortgage debts received by the testatrix, and as to the shares in the *Gloucestershire Banking Company*. The cause was then directed to stand over upon the question what was the effect, if any, of the confirmation of this settlement by the will; and it now came on for argument accordingly.

Argument.

Dickinson, Q.C., and *Cozens-Hardy*, for the Plaintiff, the surviving trustee of the settlement.

Robinson, Q.C., and *W. W. Cooper*, for the representatives of *Martha Flight*:—

The settlor, by her will, confirmed the settlement, and the residuary legatee cannot take under the will except upon the terms of confirming the settlement, and making good all the gifts under it. Lord *Eldon*, in *Rancliffe* v. *Parkyns* (1), said: "If then there is an ambiguity, we must, notwithstanding, confirm the settlement in all respects as the testator himself has done." There is, in fact, a clear case of election as against the residuary legatee: *Brown* v. *Brown* (2); *Cooper* v. *Cooper* (3); *Cookes* v. *Hellier* (4); *Birmingham* v. *Kirwan* (5); *Codrington* v. *Codrington* (6).

W. W. Karslake, for parties in the same interest:—

It was clearly the intention of the testatrix to give further validity to the settlement. She confirmed the settlement, knowing the effect of her so doing. It must be treated as incorporated in the will, and it ought to be carried out in its integrity; and although the testatrix in her lifetime received some of the mortgage-moneys, effect might be given to her clear intention by treating the case as one in which the confirmation amounted to a bequest of demonstrative legacies entitling the legatees to have sums equal to the funds as to which the settlement is incomplete set apart out of the estate of the testatrix.

W. Pearson, Q.C., and *Selfe*, for the residuary legatee:—

The settlement as regards the bank shares and moneys received

(1) 6 Dow. 149, 190.
(2) Law Rep. 2 Eq. 481.
(3) Ibid. 7 H. L. 53.
(4) 1 Ves. Sen. 234.
(5) 2 Sch. & Lef. 444.
(6) Law Rep. 7 H. L. 854.

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is simply a void settlement, and the only question is what is the effect, if any, of the words of confirmation. There are few modern cases upon the meaning of words of confirmation in such cases, but the old authorities conclusively establish, that if the thing which is purported to be confirmed is void, the confirmation of it is void also; but if that thing is voidable only, the confirmation of it binds the person confirming. "Confirmation cannot make that good or legal which was merely void": *Arundel* v. *Pembroke* (1). "A confirmation cannot create a new thing, but gives strength to a thing which was before": *Leicester* v. *Heydon* (2).

[They also referred to *Coke* upon *Littleton*, "Of Confirmation" (3); *Gilbert* on Tenures, "On Confirmation" (4); *Stephens*' Commentaries (5).]

Again, the words of confirmation are testamentary: *Jarman* on Wills (6); and where a will purports to confirm an instrument which is ineffectual, the instrument itself must be admitted to probate, which has not been done here: *Sheldon* v. *Sheldon* (7). At all events, if the words of the settlement are to be considered as taken out of that instrument and written into this will, then effect can only be given to it as a testamentary instrument containing a specific bequest of the bank shares and moneys received, with all the incidents of such a bequest. It will therefore take effect as from the death of the testatrix; and the doctrine of ademption will apply to all the beneficiaries under the settlement, and that of lapse will apply to *Martha Flight*, who died before the testatrix: *Stump* v. *Gaby* (8). No question of election arises in this case, for the testatrix does not purport to dispose by her will of property which is not her own, and there are no persons who take both under the will and settlement; moreover, if there were, the residuary legatees could only be called upon, in case of election, to give effect to the settlement according to its legal operation, which as regards these properties is nil.

[Upon the question of election, they also referred to *Blaiklock* v. *Grindle* (9).]

(1) Dyer, 263 b, pl. 36.
(2) Plowd. 384, 397.
(3) Vol. ii. lib. 3, cap. 9, sect. 515.
(4) Page 75.
(5) Vol. i. p. 521, 7th Ed.
(6) Vol. i. pp. 85, 86, 3rd Ed.
(7) 8 Jur. 877.
(8) 2 D. M. & G. 623.
(9) Law Rep. 7 Eq. 215.

Gaskell, for the charitable legatees.

HALL, V.C.:—

The question is whether the will of *Rebecca Hodges* had to any, and what, extent the effect of confirming the settlement of the 5th of February, 1850. It has been contended that as the settlement was void the confirmation of it by will was wholly inoperative. Some of the moneys on mortgage which were in terms comprised in the settlement were received by the testatrix herself in her lifetime, and the bank shares were not duly transferred by her; but although the settlement was thus incomplete, it was not incapable of being confirmed. It was complete as to part of the property it purported to comprise, and the confirmation by the will was unquestionably intended to give some further efficacy to it.

It was competent for *Rebecca Hodges*, by a testamentary disposition, to perfect that which was either void or voidable. This is not a case depending upon rigid rules of law; it is a mere question of the intention of the testatrix on the true construction of her will. The settlement was imperfect as to the mortgage moneys received by the testatrix before the date of her will, and the testatrix could not intend to confirm the settlement as to them, but as regards the bank shares, the will might well and should operate.

It has been said that the settlement not having been incorporated with the probate of the will, the confirmation of it by will cannot be regarded. I was referred to the case of *Sheldon* v. *Sheldon* (1), but I do not consider the judgment of Dr. *Lushington* in that case an authority to the effect that in no case in which an instrument is not set out at length in the probate of a will, this Court can act upon it as having operation by means of the will.

The question often arises in the Court of Probate whether a particular document shall or shall not be incorporated in the probate of a will by being set out therein. It is often convenient that a document should be so set out. It is, however, I consider, substantially a question of practical convenience, and if a will confirms an instrument which is sufficiently identified, and probate

(1) 8 Jur. 877.

V.-C. H. 1876 BIZZEY v. FLIGHT. Judgment.

passes leaving in the clause containing the confirmation, the instrument must, I consider, be had regard to as if it were set out in the probate.

The same and no greater effect must be given to the clause than would be given to it had this testatrix said, "I hereby declare that the bank shares specified in a certain settlement dated the 5th day of February, 1850, and made between [naming the parties], shall be held upon the following trusts," and had then set out the trusts.

As regards the bank shares, the will perfects the settlement as being a testamentary instrument, and therefore the *cestuis que trust* who predeceased the testatrix cannot take, and their shares fall into the residue of the testatrix's estate.

It has been said that the true way to give effect to the intention of the testatrix would be by turning this into a case of demonstrative legacy, but there is nothing in the will which warrants this.

The only way to give a further operation to the will would be to read it thus: "I direct that these shares shall be held upon such trusts as they would have been subject to if they had been effectually settled by the settlement, and for that purpose the will shall be treated as if it had been ante-dated." There is, however, no authority in support of such a reading of the will, and I think it cannot be properly adopted.

This is not a question of election. Election arises when a testator disposes of his own property and at the same time affects to dispose of property which belongs to some one else. This is a mere question of construction, and the effect is that the confirmation of the settlement by the will operates as a specific bequest of the bank shares mentioned in the settlement upon the trusts thereby declared.

The costs of all parties must be borne by the settlement fund and residuary estate in equal moieties.

Solicitors: *Waterhouse & Winterbotham*, agents for *L. W. Winterbotham, Stroud*; *Peckett & Mytton*, agents for *J. L. Fisher, Stroud*; *T. W. Watkins.*

BACON *v.* TURNER.

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1876
May 3.

[1876 B. 236.]

Practice—Judicature Acts—Writ for Service out of Jurisdiction, Form of—Leave to proceed to sign Judgment—Rules of Court, 1875, *Order* II., *r.* 4; *Order* XI., *r.* 1—*Writ of Summons—Appendix A., Part* 1, *Forms* 2 *and* 3 (1)

Where leave is given to issue a writ for service out of the jurisdiction, the words "by leave of the Court or a Judge," which occur in Forms 2 and 3 given in the Rules of Court, 1875, Appendix A., part 1, may be omitted from the writ and notice, so as to enable the Plaintiff to proceed, in default of appearance, without obtaining further leave of the Court or a Judge before so doing.

Scott v. *Royal Wax Candle Company* (1) followed.

Statement.

THIS was an action for the administration of personal estate, and two of the principal Defendants, a German gentleman and his wife, a lady of English birth, resided in *Germany*.

Argument.

Oswald, for the Plaintiff, applied for leave under Order II., r. 4, and Order XI., r. 1, to serve the writ, or notice of it, on these Defendants out of the jurisdiction, and asked that the writ might, except as to the time limited for appearance, issue in the terms of Form No. 1, given in the Rules of Court, 1875, Appendix A., part 1, instead of the terms of Form No. 2, therein given as the form for writs to be served out of the jurisdiction. The latter form only enabled the Plaintiff to proceed, in default of appearance, "by leave of the Court or a Judge;" and he asked that those words might be omitted, so as to allow the Plaintiff to proceed in default without leave. This had already been done by the Queen's Bench Division in the case of *Scott* v. *Royal Wax Candle Company* (1).

Judgment.

HALL, V.C., said that he would follow the case of *Scott* v. *Royal Wax Candle Company*, and that the words referred to might be omitted from the writ, so as to shew that the Plaintiff could proceed in default without the leave of the Court or a Judge.

Solicitor: *Arthur Cayley*.

(1) 1 Q. B. D. 404.

(1) 11 W.R. [1875] P.C. 344-6, 364-5.

V.-C. H.

1876

May 15.

BOLTON *v.* BOLTON.

[1875 B. 61a.]

Practice—Rules of Court, 1875, *Order* XXIII.; *Order* XLII., *rr.* 9, 12—*Form of Fi. Fa.* (*No.* 1, *Appendix F.*)—*Discontinuance of Action—Recovery of Defendant's Costs.*

Form of the writ of *fieri facias* to recover a Defendant's costs where a Plaintiff has given notice of discontinuance of the action under Rules of Court, 1875, Order XXIII., and has made default in payment of the Defendant's costs of the action.

Statement.

IN this case the Plaintiff had, after delivery of the statement of defence, given notice of discontinuance under Order XXIII. of the Rules of Court, 1875, which provides that in such a case the Plaintiff shall pay the Defendant's costs of the action. The Taxing Master had thereupon, pursuant to the same Order, taxed the Defendant's costs of the action upon the notice to discontinue without any order directing him to tax the costs being made in the action. The Plaintiff had made default in paying the taxed costs, and the Record and Writ Clerk, upon being applied to, refused to issue a writ of *fi. fa.* for their recovery, on the gound that, under rule 9 of Order XLII., no writ of execution can issue without production of the judgment upon which the writ is to issue. Rule 9 of Order XLII. is as follows:—"No writ of execution shall be issued without the production to the officer by whom the same should be issued of the judgment upon which the writ of execution is to issue, or an office copy thereof shewing the date of entry. And the officer shall be satisfied that the proper time has elapsed to entitle the judgment creditor to execution."

Argument.

Oswald, for the Defendant:—

The Rules of Court, 1875, contain no provision for signing judgment for costs to be recovered on a discontinuance; but the words in Order XXIII., "thereupon he shall pay the Defendant's costs of the action," must be considered as equivalent to a judgment or order for their recovery. The form of the writ of *fi. fa.*

(Rules of Court, 1875, Appendix F., Form 1) is inapplicable to the case, the tenour thereof being that the sum for which a levy was to be made was by a judgment of the Court adjudged or ordered to be paid, but Order XLII., rule 12, only provides that the forms in Appendix F. "may be used," and the Court has the power to vary such forms as circumstances may require. I therefore ask for liberty to issue a writ of *fi. fa.* with this variation in the body of the writ from Form No. 1, namely, "which was lately," &c., "in a certain action," &c., "pursuant to Order XXIII. of the Rules of Court, 1875, upon a notice in writing, dated, &c., whereby the said *A. B.* gave notice to the said *C. D.* of discontinuance of the said action, and upon the certificate of one of the Taxing Masters of our said Court, filed, &c., adjudged to be paid for the costs of the said action by the said *A. B.* to the said *C. D.*, together with interest thereon from" &c. (the date of the Taxing Master's certificate).

Argument.

HALL, V.C., gave liberty to issue the writ of *fi. fa.* in the form desired, and said that it might be issued at once, without any further or other order.

Judgment.

Solicitor: *G. Dixon*, agent for *W. M. Skinner*, *Sunderland.*

TILDESLEY *v.* HARPER.

V.-C. H.
1876
May 18.

[1876 T. 76.]

Practice—Judicature Acts—Rules of Court, 1875, *Order* XVI., *r.* 2—*Alteration of Parties—Addition of Plaintiffs.*

An alteration in the parties to an action will not be made upon an *ex parte* application.

MACLEAN, for the Plaintiff in this action, moved, under Order XVI., rule 2, for an order to strike out the Plaintiff (who was a trustee) as Plaintiff, to substitute three infant *cestuis que trust* as Plaintiffs instead of him, and to make the Plaintiff a Defendant.

Statement.

The action was one to set aside certain mortgages, and for other relief, and the motion was made *ex parte.*

(1) W.N. 1875/64 II. 348.

V.-C. H. 1876 TILDESLEY v. HARPER. Judgment.

HALL, V.C.:—

The three infant *cestuis que trust* may be joined as Plaintiffs by a next friend, and then, if there should turn out to be any misjoinder, I can, at the hearing, order the Plaintiff trustee to be treated as a Defendant. I cannot, however, alter the parties to an action upon an *ex parte* application, but you may give the Defendants notice that an order had been made in these terms, and require them to state whether they object to the order or require notice; stating to them at the same time that the Court considered they ought to have been served. Then if they do not object, the order will be drawn up as having been made upon motion, while, if they require to be served with notice, the Court, on the further application, will deal with the costs, which otherwise will be costs in the cause.

Solicitors: *Sharp & Ullithorne.*

V. C. H. 1876 *May* 17.

GOTT *v.* NAIRNE.

[1876 G. 63.]

Will—Trust to buy Advowson—Action by Cestui que Trust claiming Fund—Demurrer—Cestui que Trust not exclusive Object of Trust.

A testator bequeathed £12,000 to trustees upon trust to invest the whole or part in the purchase of an advowson; and, until his son should be presented to a benefice producing a net £1000 per annum or die, the trustees were to present some fit person to the benefice, the advowson whereof they had purchased, and, subject as aforesaid, were to hold the advowson in trust for the son, his heirs and assigns; and in the meantime, and until such investment, the trustees were to lay out the £12,000 upon certain securities, and, during twenty-one years from the testator's death, to accumulate the income, and the income of the £12,000 and the accumulations was, after the twenty-one years (in case the advowson had not been purchased), to belong to the son, his executors or administrators; and if the son died or was presented to a benefice of £1000 a year before a contract for the purchase of the advowson had been entered into, or if part of the £12,000 or the accumulations remained after completing such contract, the same was to be paid to the son, his executors or administrators.

The £12,000 having been set apart and invested and accumulated, but no

advowson having been bought, the son, thirteen years after the testator's death, claimed the entire fund:—

Held, that although there was no person who could enforce the trust, yet, as the trustees were willing to carry it out, and could present any fit person they chose to the benefice when they had bought the advowson, the son was not the exclusive object of the trust, and was not entitled to a transfer of the fund.

DEMURRER.

Statement.

The statement of claim stated as follows:—

William Gott, by a codicil to his will dated the 20th of January, 1860, gave the sum of £12,000 to *R. Nairne* and *T. W. Nelson* upon the following trust, viz.:—

"Upon trust that they, or the survivor of them, or the executors or administrators of such survivor, do and shall, as soon as conveniently may be after my decease, but nevertheless at the sole and absolute discretion of the said trustees or trustee for the time being, lay out and invest the whole, or such part as the said trustees or trustee may think proper, of the said sum of £12,000 in the purchase of the advowson, presentation, and right of donation, nomination, free disposition, and right of patronage of, in, and to some rectory, or vicarage, parsonage, or parish church or other ecclesiastical benefice, to be situate somewhere in *England*, with the right of next presentation thereto, and shall cause and procure the same to be well and effectually conveyed and assured unto and to the use of the said trustees or the survivor of them, their or his heirs and assigns for ever; and I direct and declare that in the meantime, and until my son *John Gott* shall be duly presented to and inducted into some ecclesiastical benefice which shall produce a net annual income of £1000 at the least (after deducting the necessary charges and outgoings in respect thereof), or shall previously depart this life, the said *R. Nairne* and *T. W. Nelson*, or the survivor of them, or the heirs of such survivor, do and shall nominate and present to the rectory, vicarage, or church, or other ecclesiastical benefice of which the advowson or right of presentation shall be so purchased as aforesaid, when and so often as any vacancy shall occur therein by reason of the death or removal of any person who may at any time be the incumbent thereof, such fit and proper person as the said *R. Nairne* and *T. W.*

V.-C. H. 1876 GOTT v. NAIRNE. Statement.

Nelson, or the survivor of them, or the executors or administrators of such survivor, may in their or his uncontrolled discretion select or choose for that purpose, and I direct that, subject to the trust or discretion aforesaid, the said *R. Nairne* and *T. W. Nelson*, and the survivor of them, and the heirs of such survivor, and their or his assigns, shall stand seised or possessed of the said advowson, right of patronage, and presentation so to be purchased as aforesaid, in trust for the said *John Gott*, his heirs and assigns, and to convey and dispose of the same in such a manner as he or they shall in that behalf order or direct. And I direct that in the meantime, and until the said sum of £12,000, or such part thereof as the said trustees or trustee shall think fit to lay out and invest as aforesaid, shall have been so laid out and invested, the said trustees or trustee for the time being do and shall lay out and invest the said sum of £12,000 in their or his names or name in" (certain securities therein mentioned), "and also do and shall, during the term of twenty-one years, to be computed from the time of my decease, if the said sum of £12,000, or such part thereof as the said trustees or trustee may think proper, shall not have been previously laid out and invested in the manner first hereinbefore mentioned, lay out and invest all the interest, dividends, and annual produce which shall arise from the said sum of £12,000, and all the resulting income thereof in their or his names or name in or upon any such stocks, funds, or securities as hereinbefore mentioned, in order that the same may be accumulated in the way of compound interest. And I direct and declare that such accumulated fund shall be applicable upon the trusts and for the intent and purpose first hereinbefore expressed or declared concerning the said sum of £12,000, and that the interest, dividends, and annual produce which shall arise from the said sum of £12,000 and the accumulations thereof, and the stocks, funds, and securities upon which the same respectively shall be laid out and invested after the expiration of the term of twenty-one years, to be computed from my decease, in case such investment as first hereinbefore mentioned shall not have been previously made, shall belong and be paid to the said *John Gott*, his executors or administrators. Provided always, and I direct that if the said *John Gott* shall depart this life, or shall be nominated or

presented to and inducted into some ecclesiastical benefice of the annual value aforesaid before any contract for such purpose as hereinbefore mentioned shall have been entered into, or if any part of the said sum of £12,000, or the accumulations thereof, shall remain unapplied and undisposed of after completing any contract for such purpose as aforesaid, then, and in either of such cases, the said sum of £12,000, and the accumulations thereof, and the stocks and funds and securities in or upon which the same respectively may be invested, or so much of the same respectively as shall remain unapplied and undisposed of, as the case may be, shall belong and be paid to the said *John Gott*, his executors or administrators."

The testator died in August, 1863.

The will was duly proved. The executors assented to the bequest, and set apart a sum of £12,000, or securities representing that amount, in satisfaction of the legacy; and invested and accumulated the income; and in August, 1875, the legacy and accumulations were represented by the sum of £10,000 railway debenture stock and the sum of £8091 7*s.* 7*d.* consols, which sums, with subsequent accumulations of interest, were standing in the names of the trustees; and no advowson had been bought by them. The Plaintiff, *John Gott*, the son of the testator, had, however, been inducted to the vicarage of *Leeds*, and he brought this action against Messrs. *R. Nairne* and *T. W. Nelson*, the trustees of the legacy and codicil, indorsing his writ with a claim for the payment or transfer of the £12,000 and the accumulations, and that the trusts of the legacy might, if necessary, be carried into execution. By his statement of claim the Plaintiff alleged that the trustees denied that his benefice produced a net annual income of £1000; he submitted, however, that according to the true effect and meaning of the codicil he was entitled to have the legacy of £12,000, with all accumulations of the income thereof, or the securities representing the same, transferred to him without reference to the question whether the net annual income of his benefice amounted to £1000; and he claimed to have the securities and moneys representing the legacy and income transferred and paid to him accordingly.

To this claim the Defendants demurred, on the ground that,

V.-C. H. 1876 GOTT v. NAIRNE. Argument.

according to the true construction of the codicil, the Plaintiff was not entitled to the relief asked.

Hastings, Q.C., and *Kekewich*, for the Defendants, in support of the demurrer:—

The trustees claim no beneficial interest for themselves, but they desire to carry out the wishes of the testator, and are ready to purchase the advowson when an opportunity offers. The question is, whether the Plaintiff is entitled now to claim the legacy and the securities representing it, and his claim must be regarded in the same manner as if he had made it immediately after the death of the testator.

The Plaintiff will probably base his claim upon the principle of the cases which decide that in the absence of a gift over a legatee of full age is entitled to enter upon the absolute enjoyment of property given for his benefit by a will, notwithstanding that the testator may have directed that he was not to have it until a later age, or that it was to be laid out in some particular way for his benefit, *e.g.*, in the purchase of an annuity for his life, such as *Saunders* v. *Vautier* (1); *Harbin* v. *Masterman* (2).

But in order to bring himself within the principle of those cases the Plaintiff must have been the exclusive object of the trust, for if there is any other person who may be an object of it, then the principle does not apply: *Talbot* v. *Jevers* (3).

Now, in this case the Plaintiff is not such exclusive object, for the trustees may, if they choose, select some one else to present to the benefice; and there is no authority to the effect that where there is not merely a trust to accumulate for the benefit of a claimant, but also a trust which the trustees need not necessarily exercise for his benefit, he can be absolutely entitled to the trust fund.

Dickinson, Q.C., and *Ingle Joyce*, for the Plaintiff:—

Substantially the Plaintiff is the exclusive object of this trust, for there is no other *cestui que trust*, and he is the only person interested in the advowson if it is bought, or in the fund if it is not

(1) 4 Beav. 115, 118; Cr. & Ph. 240. (2) Law Rep. 12 Eq. 559, 564.
(3) Law Rep. 20 Eq. 255.

bought. An advowson can generally be bought for twelve years' purchase, and the trust was probably an elaborate provision on the part of the testator, having for its object to secure his son the position of a beneficed clergyman with £1000 a year, without his being exposed to a charge of simony. If it had been another sort of property, which the trustees were to purchase, the *cestui que trust* would be clearly entitled, and the object the testator has in his mind does not affect the right of the claimant. The case of a direction to purchase an annuity is one, and the case of a direction to postpone the enjoyment of property beyond the attainment of twenty-one by a devisee without a gift over, is another example of this.

In *Gosling* v. *Gosling* (1), which is a case of the latter kind, Vice-Chancellor *Wood* said: "The principle of this Court has always been to recognise the right of all persons who attain the age of twenty-one to enter upon the absolute use and enjoyment of the property given to them by a will, notwithstanding any direction of the testator that they are not to enjoy it until a later age: unless during the interval the property is given for the benefit of another." The whole scheme of this trust shews it is for the exclusive benefit of the Plaintiff the advowson is to be bought; until the Plaintiff has a benefice of £1000 a year some person, who may be himself, is to be presented, and when he has the benefice the advowson is to be his, and if the advowson is not bought, the income of the accumulated fund is, at the end of twenty-one years, to be his also. Moreover, the discretion as to the purchase or presentation is to be exercised, not by persons whom the testator knows, but in the one case by the executors, and in the other by the heirs of the survivor of the trustees. There is no intention to provide for any particular family or person other than the Plaintiff, and the unknown person to be presented cannot be taken to be a *cestui que trust* nor an object of the testator's bounty. There is, then, no one who can enforce the performance of the trust; and it is a case in which there is trustee and trust fund, but no *cestui que trust*—one ingredient necessary to the valid creation of a trust is accordingly wanting. It is quite consistent with the will that the whole beneficial interest should

(1) Joh. 265. 3 Jur. N.S. 910, 911

V.-C. H. 1876 GOTT v. NAIRNE. Argument.

belong to the Plaintiff; and, although there is a direction to accumulate the fund for twenty-one years, if the Plaintiff is entitled to the whole income at the expiration of that time, he is entitled to it now: *Gosling* v. *Gosling* (1).

The case resolves itself into a gift of a fund to be invested in the purchase of an advowson for the Plaintiff, with a direction that until the fund is so invested it shall be accumulated, and that the income of the accumulated fund shall belong to the Plaintiff at the expiration of twenty-one years. As, therefore, the trustees do not claim any beneficial interest, and they have not bought the advowson, and no one can require them to buy it except the Plaintiff, and when it is bought it is to belong to him, he is entitled to call for a transfer of the fund to himself. It is the case of an honorary trust which is void, like a trust to maintain or repair a tombstone, which is void unless enforced by a clause of forfeiture: *Lewin* on Trusts (2), or unless the tombstone is in a church, when the trust is valid as a charitable gift. Upon this point, *Thomson* v. *Shakespeare* (3), which was the case of a bequest to form a museum at *Shakespeare's* house, is an authority.

Hastings, in reply:—

The contention on behalf of the Plaintiff that he may be the exclusive object of the trust admits that he is not. If trustees in whom an honorary trust is vested are willing to carry it out, the Court will not control their discretion. There is no authority which extends the principle of *Saunders* v. *Vautier* (4) to a person who is not the exclusive object of the trust.

Judgment.

HALL, V.C.:—

The trustees in this case have disclaimed for themselves any beneficial interest in this bequest, but have not disclaimed all desire to perform the trust according to its terms; and, on the contrary, they are quite willing to carry it out. The testator has directed that something which is perfectly legal shall be done; and the Plaintiff not being able to shew that the trusts in question are all trusts for his own exclusive benefit, which he can con-

(1) Joh. 265. (3) Joh. 612; 1 D. F. & J. 399.
(2) Page 94. (4) 4 Beav. 115; Cr. & Ph. 240.

V.-C. H. 1876 GOTT v. NAIRNE. Judgment.

trol and put an end to, it seems to me that this demurrer must be allowed. The trustees may yet purchase an advowson, and under the terms of the trust, "when and so often as any vacancy shall occur," they may present to the benefice some fit person, not necessarily the Plaintiff, to fill the vacancy, and this they may do from time to time. The object of the trust, therefore, was not to buy the advowson and then present some particular beneficiary, but the trustees may in their uncontrolled discretion select any fit person they choose, and their having presented once does not exhaust the trusts other than those in favour of the son. It cannot be said that the Plaintiff was the exclusive object of the trusts.

I cannot, therefore, hold that the Plaintiff is absolutely entitled to the fund, and the demurrer must be allowed.

Solicitors: *T. W. Nelson*; *Richard Smith*, agent for *Ford & Son, Leeds.*

HUNT-FOULSTON *v.* FURBER.

V.-C. H. 1876 *May* 22.

[1876 F. 68.]

Gift to Trustees—Direction to purchase an Annuity in the name of and for Annuitant—Proviso against selling Annuity—Residuary Estate—Contract for Sale of Annuity.

Testatrix gave a sum of £20,000 stock to be laid out by the trustees of her will in the purchase of a government annuity in the name of and for the benefit of her godson for the term of his natural life; and directed that the annuitant should not be entitled to have the value of his annuity in lieu thereof, and that if he should sell his annuity the same should cease and form part of her residuary estate. The trustees purchased an annuity in the name, and payable during the life, of the annuitant, and he entered into a contract to sell the same:—

Held, that the annuitant was absolutely entitled to the annuity, and that he could make a good title to it to the purchaser.

Statement.

SPECIAL CASE under the 13 & 14 Vict. c. 35, and the Judicature Acts, 1873 and 1875.

Eliza Foulston, who died on the 21st of February, 1875, by her will dated the 13th of May, 1874, after appointing four trustees, and after reciting the titles of certain funds over which she had a

V.-C. H. 1876 HUNT-FOULSTON v. FURBER.

Statement.

power of appointment and other funds belonging to her, made (among similar gifts to other persons) the following bequest in favour of the Plaintiff:—"I give and bequeath the sum of £20,000 stock to be laid out by my trustees in the purchase from the said Commissioners, in the name and for the benefit of my godson *John Foulston Hunt*" therein described, "of an annuity for the term of his natural life." The term "the said Commissioners" referred to the Commissioners for the Reduction of the National Debt. The testatrix by her will provided that the several bequests, appointments, and gifts in the will contained in favour of the Plaintiff should be conditional on his assuming the name and arms of *Foulston* in addition to those of *Hunt*, and that condition the Plaintiff had complied with.

The will also contained the following provision:—"And I direct that neither of the said intended annuitants shall be entitled to have the value of his or her annuity in lieu thereof, and that if either of them the said *John Foulston Hunt*" and the other four persons named "shall sell, mortgage, pledge, or anticipate his or her annuity, the same shall thereupon cease and determine and form part of my residuary estate." There was a residuary bequest in favour of another legatee. The trustees purchased an annuity of £933 in the name, and payable during the life, of the Plaintiff, who, being desirous of selling the same, entered into a contract for the sale thereof to the Defendant, but he objected to complete the purchase on the ground that any such sale by the Plaintiff would cause an immediate forfeiture of the annuity; the Plaintiff, however, maintained that the provision in the will against selling was void, as being repugnant to the absolute bequest in his favour.

The question was whether, in the event of the Plaintiff mortgaging or selling his annuity, the same would thereupon cease and determine, and form part of the residuary estate of the testatrix.

Argument.

Dickinson, Q.C., and *Chubb*, for the Plaintiff:—

The testatrix made an absolute gift, and the restriction which she endeavoured to impose on the annuitant is void. There is no interposition of trustees, but the annuity is in the annuitant's own name, and the general rule, to be found in the case of *Bradley* v. *Peixoto* (1),

(1) 3 Ves. 324.

is, that if an estate or fund be given so that the legal estate or absolute interest be vested in the donee, without any intervention of trustees, the condition that the estate or fund shall not be disposed of will not be enforced, it being repugnant to the gift. In *Shee* v. *Hale* (1), as well as in *Power* v. *Hayne* (2) and *Day* v. *Day* (3), the legal interest was not, as here, in the annuitant, and therefore the decisions in those cases are not inconsistent with that in *Bradley* v. *Peixoto* (4); but the decisions in *Power* v. *Hayne* and *Day* v. *Day* are irreconcilable, as Vice-Chancellor *Malins* in deciding the former case declined to follow the decision of Vice-Chancellor *Kindersley* in the latter. The conclusion to be arrived at is that the Plaintiff can make a good contract to sell the annuity.

Argument.

Hastings, Q.C., and *G. W. Chapman*, for the Defendant, submitted that the contract had not been properly entered into, and could not, therefore, be carried out. Though there was no authority precisely in point, yet the decisions in *Power* v. *Hayne* and in *Hatton* v. *May* (5), before the same learned Vice-Chancellor, clearly shewed that the annuitant could not sell his annuity.

HALL, V.C.:—

Judgment.

I am of opinion that the decisions referred to have very little bearing upon this case. Where a testator makes an absolute gift by will to an individual he cannot take it away in a subsequent part of the will, unless he uses clear and distinct language to that effect. No doubt there was an intention to prevent the annuitant from selling the annuity, and also an attempt to make the fund form part of the residuary estate, but there being a previous absolute gift, the latter intention is inconsistent with the gift itself. The testatrix directed the trustees to purchase the annuity in the name of the annuitant, and that they have done; and the attempt to fasten a trust upon him fails. The trust created by the testatrix was at an end as soon as the trustees discharged the duty of purchasing the annuity in the name of the annuitant.

(1) 13 Ves. 404.
(2) Law Rep. 8 Eq. 262.
(3) 1 Drew. 569.
(4) 3 Ves. 324.
(5) *Ante*, p. 148.

V.-C. H. 1876 HUNT-FOULSTON v. FURBER.

The declaration will be that the Plaintiff is absolutely entitled to the annuity; that it is not subject to any gift over; and that he can make a good title to it to the Defendant.

Solicitors: *Deane, Chubb, & Co.*

V.-C. H. 1876 *May* 25.

HIGGINBOTTOM *v.* AYNSLEY.

[1876 H. 146.]

Practice—Rules of Court, 1875, *Order* XXI., *r.* 1 (*a*)—*Order* XXIX., *r.* 1—*Default of Pleading—Dismissing Action.*

The Plaintiff being bound to deliver a statement of claim, and not having done so within the six weeks allowed by Order XXI., rule 1 (*a*), the Defendant moved under Order XXIX., rule 1, to dismiss the action with costs for want of prosecution. The Court gave the Plaintiff one week's time to take further proceedings, he paying the costs of the motion.

Statement. THE writ of summons in this action was issued on the 23rd of March, 1876. The Defendant appeared, and did not state that he did not require a statement of claim, but no statement of claim had been delivered within the six weeks prescribed by Order XXI., rule 1, clause (*a*).

The Defendant now moved, under Order XXI., rule 1, to dismiss the action with costs for want of prosecution.

Argument. *W. Barber*, for the Defendant, in support of the motion.

W. Renshaw, for the Plaintiff, said that negotiations had been in progress, and asked the Court to follow the old practice, and to give a fortnight's time in which to take further proceedings, submitting to pay the costs of the motion.

Judgment. HALL, V.C.:—

I think a week's time will be long enough. Each case must depend upon its own merits. I shall accordingly give the Plaintiff a week's time, he paying the costs of the motion.

Solicitors: *Henry Tyrrell; Milne, Riddle, & Mellor.*

(1) W.N. (1875) 207. (2) W.N. (1875) 207.

In re DERBY MUNICIPAL ESTATES.

V.-C. H.
1876
May 26.

Lands Clauses Consolidation Act, 1845, *s.* 69—*Money paid into Court by Railway Company for Corporation Lands—Mortgages and Bonds of Corporation affecting their Lands*—5 & 6 *Will.* 4, *c.* 76, *ss.* 92, 94—9 & 10 *Vict. c.* 74, *s.* 21.

Money paid into Court under sect. 69 of the *Lands Clauses Consolidation Act*, 1845, by a railway company, for the purchase of lands belonging to the corporation of *Derby*, was ordered to be applied in the payment off of mortgages of certain tolls and of bonds which had been given by the corporation for moneys borrowed under the provisions of the 9 & 10 Vict. c. 74, s. 21, and were payable out of the borough fund, which fund was largely composed of the rents and profits of the real estates of the corporation.

Statement.

THE question on this petition was whether certain mortgages and bonds under the seal of the corporation of *Derby* were debts or incumbrances affecting the lands of the corporation within sect. 69 of the *Lands Clauses Consolidation Act*, 1845.

The *Great Northern Railway Company* had purchased and taken lands belonging to the corporation, and had paid the purchase-money into Court.

The corporation of *Derby* were the owners of certain tolls of the *Cattle Market* and *Market Hall*. They were ancient franchises granted or confirmed by charters made in the reigns of Queen *Mary* and King *Charles* II. With the assent of the Lords Commissioners of the Treasury, granted under the 5 & 6 Will. 4, c. 76, s. 94, the corporation had executed certain indentures of mortgage of these tolls for a period of years.

The borough fund of *Derby* was constituted of the particulars mentioned in the 5 & 6 Will. 4, c. 76, s. 92. The evidence of the Town Clerk shewed that it was largely composed of the rents and profits of the real estates of the corporation. Under the provisions of the *Baths and Washhouses Act* (9 & 10 Vict. c. 74), the corporation had, in 1856, with the sanction of the Lords Commissioners of the Treasury, acting under sect. 21, borrowed for the purposes of that Act the sum of £3500. The securities given by the corporation were not in form mortgages, but common money bonds. The bonds not paid off represented a part of the £3500.

V.-C. H. 1876

In re DERBY MUNICIPAL ESTATES.

Argument.

The interest on the bonds had always been paid out of the borough fund.

The Petitioners prayed that the fund in Court might be applied in paying off these mortgages and bonds.

W. Renshaw, for the Petitioners, submitted that the words "debt" and "affecting" in the 69th section of the *Lands Clauses Consolidation Act*, 1845, were very wide. "Debt" was a more general and comprehensive term than either mortgage, charge, or "incumbrance." The extensive meaning of the word "affecting" was plainly shewn in the case of *Lord Lovat* v. *Duchess of Leeds* (1).

These bonds could be paid only out of the borough fund, which was a mixed fund, made up in part of the rents of the real estates of the corporation. They therefore affected, and were debts affecting, such real estates. As to the indentures of mortgage, they were charged on the tolls, which were incorporeal hereditaments, and were clearly incumbrances on the estates of the corporation. On the 19th of July, 1872, Vice-Chancellor *Malins* directed payment off out of moneys paid in by a railway company of one of this very class of mortgages.

Stevens, for the railway company.

Judgment.

HALL, V.C., made the order as prayed.

Solicitors: *Satchell & Chapple*, agents for *Gadsby, Derby; Johnston, Farquhar, & Leach.*

(1) 2 Dr. & Sm. 62.

BURNS *v.* IRVING.

V.-C. H.

1876

May 31.

[1875 B. 111.]

Practice—Charging Order to secure Costs—Costs not yet taxed—Rules of Court, 1875, Order XLVI., *r.* 1 (1)

6 Ch D 130
— 365 ; 8

Where a Plaintiff's bill had been dismissed with costs, an order *nisi* charging railway shares belonging to the Plaintiff with the amount of the Defendant's costs when taxed was made before taxation upon the application of the Defendant.

THE bill in this suit had been dismissed with costs.

Dickinson, Q.C., and *T. A. Roberts*, for the Defendant, applied *ex parte*, under 1 & 2 Vict. c. 110, ss. 14, 15; 3 & 4 Vict. c. 82, s. 1; and Rules of Court, 1875, Order XLVI., rule 1, for an order charging railway shares belonging to the Plaintiff in order to secure the Defendant's costs of the suit, although such costs had not been actually taxed.

HALL, V.C., made an order *nisi* charging the shares with the amount of the costs when taxed.

Solicitors: *Helder & Roberts.*

(1) See Not followed see Hodgson v. Tapper 6 Ch D. 364 C

V.-C. H.
1876
June 1.

In re LEIGH, DECEASED.
ROWCLIFFE *v.* LEIGH.

[1875 L. 100.]

Practice—Judicature Act, 1873, *s.* 57—*Reference to Official Referee—Question of Account.*

5 Ch D. 592. 6 Q B D 428

The expression "questions of account" in the 57th section of the *Judicature Act*, 1873, will receive a large construction.

A claim made in an administration suit by a dealer in works of art against the estate of the testator for £19,000, the aggregate prices of twenty-four items, consisting of pictures and articles of vertu supplied to the testator in his lifetime, and specified in an account delivered to his executor, was, on the application of the executor under that section, ordered to be tried before the official referee.

Statement.

THIS was a suit instituted by Mr. *E. L. Rowcliffe* as a creditor of the testator, Mr. *John Gerard Leigh*, late of *Luton Hoo*, in the county of *Herts*, against his widow and executrix, for the administration of the personal estate of the testator, in which the ordinary administration decree was made on the 25th of June, 1875. In the course of the administration a claim was brought in by Mr. *Reuben Brooks*, of 106, *New Bond Street*, a dealer in works of art, for the sum of £19,193, for goods sold and delivered to, and work done for the testator at his request, in the months of June, July, and September, 1875. The particulars of the claim were specified in an affidavit made by the claimant in support of it, and consisted of twenty-four items headed—"The following pictures, &c., to the best of his belief by the following masters, at the following agreed prices." The first of these items was "a grand clock and pair of candelabra *en suite* in onyx, bronze, marble, &c., at £3,300," and the remainder consisted of marble vases and busts, a bronze table, and other articles of vertu, and various pictures by *Rubens*, *Gabriel Metzu*, *Paul Potter*, *Faed*, and other masters. By his affidavit the claimant deposed that the prices of all the articles comprised in the claim had been agreed to by Mr. *Leigh* before they were delivered; that the Defendant, Mrs. *Leigh*, was present on several occasions when such prices were fixed; and that at the time of

Seaman v. 4 Ch D. 661.

the sale he always informed Mr. *Leigh* that he never warranted articles to be genuine, although he then believed and still believed that they were by the masters represented.

Dickinson, Q.C., and *Method*, for the Defendant, Mrs. *Leigh*, now moved, under sect. 57 of the *Judicature Act* of 1873, and the Rules of Court, 1875, Order XXXVI., rules 30 to 34, for an order that the claim might be tried before a special or the official referee.

W. Pearson, Q.C., and *Millar*, for the claimant, *Brooks*, opposed the motion:—

There has been great delay in meeting this claim; there are no special grounds for the application, and the claim ought to be tried in the ordinary way. Moreover, the 57th section of the Act of 1873 only enables the Court to order questions or issues of fact or questions of account to be tried before a referee, and this claim involves neither, and consequently cannot be so referred.

HALL, V.C.:—

I think that in this case the matter must go to a referee. The statement in the affidavit of Mr. *Brooks* as to the prices of the articles supplied being fixed and booked in the presence of Mrs. *Leigh*, applies only to some of them. As regards many of them, therefore, there is at present only the claimant's own representation in support of that statement. And the same observation applies to his statement that he always said he did not warrant the articles to be genuine; for that statement is said to have been made to the testator, Mr. *Gerard Leigh*, and is not stated to have been made in the presence of Mrs. *Leigh* at all. Therefore, there is no evidence at present to support the claimant's statement in that respect. It is manifest to my mind upon this affidavit that questions will arise as to many, or it may be all of these purchases, first, whether there was an agreement come to or not as to the price; and, secondly, whether or not there was a warranty of each particular article. There will, therefore, be a series of trials—some twenty in number—all involving these different questions. As regards delay, although much time seems to have been taken up, yet we are only now at that stage in which these matters must

V.-C. H. 1876 *In re* LEIGH, DECEASED. ROWCLIFFE *v.* LEIGH. Judgment.

be investigated somehow, and the question is how they can be best investigated. I am satisfied that the best and quickest method will be to have the matter referred instead of having a series of affidavits, and then a cross-examination founded upon them, and then a hearing before the Chief Clerk, and then a reference to the Judge to consider whether the Chief Clerk has come to a just and right conclusion upon that evidence.

That being so, the question is whether I can or should direct this reference. It is said that the 57th section of the Act of Parliament does not apply to a case of this kind, and that I have no power to order it to be referred. Now, I am not at all disposed to narrow the construction of that section. The Court will take care not to direct a reference unless it be a better mode of trial than any other. As regards the terms of the section itself, it is said that the words "questions of account" are inapplicable to a case of this kind. I shall, however, give a large construction to that word "account" until it is held that it ought to receive a narrow one. The account here contains twenty-four items, and the claim is made upon the account so sent in; and I shall not narrow the construction of the word "account." I am satisfied from the nature of the case, which is sufficiently indicated by the affidavit on the part of the claimant, that there may, and probably will, arise in connection with the question of warranty questions requiring the evidence of skilled persons in reference to the genuineness of some of these articles. That also brings the case within the 57th section, which appears to me to provide for cases in which a scientific investigation is required which cannot in the opinion of the Court be conveniently made before a jury, or conducted by the Court through its ordinary officers. I do not think that the investigation of a case involving questions of this kind can be conveniently made through my Chief Clerk in the ordinary manner.

The only remaining question is whether I shall refer the case to the official referee or to a special referee, and as I understand that Mr. *W. Pearson* is not in a position to consent to a reference to a special referee, the reference will be to the official referee in rotation.

Solicitors: *Gregory, Rowcliffes, & Co.; Duignan & Smiles.*

PITT *v.* LORD DACRE.

V.-C. H.
1876
June 2.

[1866 P. 115.]

Statute of Limitations (3 & 4 *Will.* 4. *c.* 27)—*Foreign Real Estate—Annuity charged on Estate in Jamaica—Last Payment in* 1842—*Rents and Profits received since* 1870—*Arrears.*

By will in 1810, *B.* devised to trustees his estate in *Jamaica* to hold to the use that *H.* should, out of the rents and profits, receive for life an annuity payable quarterly for her separate use, with powers of distress and entry and perception of the rents and profits, and after her decease to the use that the trustees should pay the annuity unto her children, as she should appoint, for their lives.

The testator gave other annuities out of the rents and profits of the same estate, and gave the estate to the use of his son for life, with remainders over. The last payment on account of *H.*'s annuity was in 1842. *H.* died in 1853. She made an appointment, and arrears were due to her and her appointees. The estate was for some years a waste, and no rents and profits were received till 1870, and when received they were paid into Court:—

Held, that the *Statute of Limitations* (3 & 4 Will. 4, c. 27) did not apply to *Jamaica*, and that the legal personal representative of *H.* was entitled to be paid the arrears due to her.

PETITION.—FURTHER CONSIDERATION.

Statement.

Peter Beckford, who died soon after the date of his will, made in October, 1810, devised to three trustees his estate situate in the island of *Jamaica*, together with the negroes and slaves thereon, to hold the same to the use that his daughter *Harriet* should, out of the rents and profits of the said estate, receive for life an annuity of £200 English currency, payable quarterly, for her separate use, with power of distress and entry and perception of the rents and profits, and after her decease to the use that the trustees should pay the said annuity unto all the children of his said daughter, in such shares and manner as she should appoint, for their lives. The testator gave other annuities, and made them payable out of the rents and profits of the same estate; and subject to the payment of the annuities, the testator gave the estate to the use of his son for life, with remainders over.

The son became the third Baron *Rivers*, and died in 1831. His son, the fourth Baron *Rivers*, in 1833, barred the estate tail, and

V.-C. H. 1876 PITT v. LORD DACRE. Statement.

died in 1866, having by will in 1862 devised all his real estate to Lord *Dacre* upon trust for sale and disposition of the proceeds as in the will mentioned.

Suits were instituted for the administration of the fourth Baron *Rivers'* real and personal estates. The annuity of £200 was paid to the daughter *Harriet* for many years after her father's death and the last payment on account thereof was made on the 27th of December, 1842. The daughter *Harriet*, who died on the 20th of December, 1853, by will in April, 1840, appointed £199 19*s.* a year of the annuity to her three daughters for life, and to the survivors and survivor, and after the death of the survivor to her son *Henry* for life, and after his death to her son *Horace* for life, and she appointed the residue of the annuity to all her children as joint tenants for life. At the death of the daughter *Harriet* there was due to her for arrears of the annuity the sum of £2150 being the amount which had accrued due between the 25th of December, 1842, and the 29th September, 1853, and there was due to her daughters (all of whom had died) and others under her and their wills for arrears of the annuity the aggregate sum of £2100. It was stated that for several years prior to 1866 the estate in *Jamaica* became a waste, that no income was received from it, and that after certain proceedings had been taken in reference to its better management, Lord *Dacre* received since 1870 rents and profits now amounting to about £500, and paid the same into Court. The Chief Clerk had certified that the legal personal representative of the daughter *Harriet* was entitled to the funds in Court.

Argument.

Eddis, Q.C., and *Bagot*, for the legal personal representative of the daughter *Harriet*:—

The devisees under the testator's will in this matter were really trustees of the annuity bequeathed on the death of his daughter *Harriet* for her children, according to her appointment under the power in the will. They were therefore trustees of the annuity *ab initio*: and there was an express trust of it, ousting the *Statute of Limitations* altogether.

[HALL, V.C.:—I do not see how there can be an express trust.]

If not, then there are two points—First: The devisees have the

legal estate in the property for the purpose of dividing it among the children: *Hoghton* v. *Hoghton* (1); *Brown* v. *Whateley* (2); *Jacquet* v. *Jacquet* (3).

[HALL, V.C., after referring to *Watson* v. *Pearson* (4), said he thought that the trustees had a legal estate in the property, and that the owners of the rent-charges had also a legal estate in them, having powers of distress and entry for their recovery.]

Secondly: The *Statute of Limitations* does not apply to *Jamaica*.

[HALL, V.C.:—That is a question of fact.]

The old English law applies to *Jamaica*. With respect to that, the case stands thus: The English statute 3 & 4 Will. 4, c. 27, has not been re-enacted, and is not in force in *Jamaica;* and therefore the law of *England*, as it stood before that statute, is the law of the island.

The law which regulates the prescription of actions is, as a general rule, the *lex loci fori: Ruckmaboye* v. *Mottichund* (5); *Burge's* Conflict of Laws (6). But whether a charge on real estate is barred by prescription depends on the *lex loci rei sitæ: Burge's* Conflict of Laws (7); *Story's* Conflict of Laws (8). Now, the only English statutes on the subject which were in force in *Jamaica* before the 3 & 4 Will. 4, c. 27, were the 32 Hen. 8, c. 2, s. 4, and the 21 Jac. 1, c. 16, which did not apply to distress or claims for rent-charges, whether created by deed or will, and it is proved that there is no bar by the law of *Jamaica: Shelford* on Real Property Statutes (9); *Collins* v. *Goodall* (10); *De Beauvoir* v. *Owen* (11). Colonial lands are not bound by English statutes unless expressly named in them, or unless the colonial Legislature re-enacts the statutes: *Burge's* Conflict of Laws (12). The circumstances of this case exclude any presumption of payment; and as to laches, there could have been none, the estate producing

(1) 15 Beav. 278, 299.
(2) 8 Hare, 145.
(3) 27 Beav. 332.
(4) 2 Ex. 581.
(5) 8 Moo. P. C. 4.
(6) Vol. i. p. 24.
(7) Vol. iii. pp. 125, 126.
(8) 6th Ed. p. 582.
(9) 8th Ed. p. 139.
(10) 2 Vern. 235.
(11) 19 L. J. (Ex.) 177, 182.
(12) Vol. ii. p. 386.

V.-C. H. 1876 PITT v. LORD DACRE. Argument.

nothing till very recently: *Stackhouse* v. *Barnston* (1). The right of the annuitants to all the arrears of their annuities remains untouched by any statute. The *lex loci* applies to the case, and the legal personal representative is now entitled to this money, as representing the daughter *Harriet's* annuity, as far as it will go. [They also cited *Forbes* v. *Adams* (2) and *Harris* v. *Quine* (3).]

J. J. Hamilton Humphreys, for a creditor of Lord *Rivers'* estate for a very large amount:—

This money is assets of Lord *Rivers'* estate, which has come to the hands of his executor, and the demand of the legal representative of the daughter is a stale one. As assets of Lord *Rivers'* estate, the money is subject to the *lex fori*, as personal estate; and the legal personal representative of the daughter has not shewn, and cannot shew, as against the creditor's right to Lord *Rivers* real and personal estate, that this money is not, being administered in due course by this Court, the property of the creditor: *Campbell* v. *Graham* (4). Moreover, I submit that six years' arrears of interest only should be allowed, if any allowance is made: *Francis* v. *Grover* (5).

Dickinson, Q.C., and *H. R. Young*, for Lord *Dacre*, took no part in the argument. They suggested, however, that this money was not personalty, but realty, of Lord *Rivers'*, and asked for the direction of the Court as to future payments on account of the annuity.

Judgment.

HALL, V.C.:—

The question is whether these annuities, which were given out of an estate situate in *Jamaica*, are, under the circumstances, recoverable after a period when, in consequence of the *Statute of Limitations* (3 & 4 Will. 4, c. 27), they would not be recoverable out of an estate situate in *England*, and I am of opinion that they are. There is no corresponding statute of limitations applicable to the island of *Jamaica*. These annuitants are, in my judgment,

(1) 10 Ves. 453.
(2) 9 Sim. 462.
(3) Law Rep. 4 Q. B. 653.
(4) 1 Russ. & My. 453; 2 Cl. & F. 429.
(5) 5 Hare, 39.

as much entitled to recover their annuities as the estate itself, as they are only portions of the estate. There is no ground for contending that the rights of the annuitants have been barred by laches on their part. In *Campbell* v. *Graham* (1) the circumstances were different. Here there was no fund out of which to pay the annuities, and therefore the annuitants cannot be considered as guilty of laches in not taking proceedings to obtain payment out of a non-existing thing. When there were rents and profits which became available and properly applicable for the payment of the annuities, the devisee in trust, Lord *Dacre*, having knowledge of these annuities, paid the moneys which he received on account of rents and profits into Court, to be dealt with according to the rights of the parties. If a receiver had been appointed, he would have been directed to keep down the annuities, and I cannot consider that what has been done has taken away the rights of those who are entitled to them; therefore I shall declare that the arrears of the annuities are properly payable out of the rents and profits which have been received by Lord *Dacre*, and paid into Court, so far as the same will extend for such payment; and I order that, subject to the payment, as between solicitor and client, of the costs of this petition, the funds in Court be applied, so far as they will extend, towards payment of such arrears. Any future rents and profits must be paid into Court to the same account, with liberty to apply.

Solicitors: *Meynell & Pemberton; Young, Jackson, & Beard; Coulthurst & Van Sommer.*

(1) 1 Russ. & My. 453; 2 Cl. & F. 429.

V.-C. H.
1876
June 19.

In re EMERY'S ESTATE.
JONES *v.* EMERY.

[1876 E. 44.]

Will—Gift to three Children of Niece—A fourth Child en ventre sa mère at Date of Will.

Testatrix, who died in November, 1874, by her will in January, 1874, bequeathed to each of the three children of her niece £1000; and if any of the said three children should die before attaining the age of twenty-one years, the legacy was to be divided between the survivors of the said three children. There was a codicil in June, 1874, confirming, as regarded this bequest, the will. At the date of the will the niece had three children living, the youngest being three years old, and a fourth child *en ventre sa mère* at the time, and born in July, 1874, claimed a legacy of £1000:—

Held, that the three children born at the date of the will only were entitled to legacies.

Statement.

ALICE EMERY, who died on the 17th of November, 1874, by her will, dated the 15th of January, 1874, after giving certain legacies, devised and bequeathed the residue of her real and personal estate to three trustees in trust to convert the same into money, and to pay, *inter alia*, "to each of the three children of my niece *Lucy Alice*, the wife of *Humphrey Bradley Jones*, schoolmaster, one thousand pounds; and if any of the said three children shall die before attaining the age of twenty-one years, the legacy or legacies of the child or children so dying shall be divided between or paid to the survivors or survivor of the said three children." There was a gift of another legacy, and of the residuary estate. By a codicil dated the 26th of June, 1874, there was an alteration as to the trustees, and there were other bequests, and then a confirmation of the will in all other respects. At the date of the will *Lucy Alice Jones* had three children born, viz., *F. L. Jones*, aged seven years; *J. G. Jones*, aged five years; *A. B. Jones*, aged three years; and a fourth child, the Plaintiff, then *en ventre sa mère*, and afterwards born on the 28th of July, 1874. *Lucy Alice Jones* and another niece were the testatrix's next of kin. The Plaintiff submitted that, notwithstanding the reference in the will to the children of *Lucy Alice Jones* as being three in number, he was entitled to a

legacy of £1000 under the bequest, and prayed for declaration accordingly, but subject to such gifts over as therein contained in the event of his dying under the age of twenty-one, and for consequential relief.

The action came on to be heard on demurrer.

Argument.

W. Pearson, Q.C., and *Cadman Jones*, for the demurrer, after stating the facts, were stopped by the Court.

Dickinson, Q.C., and *Bardswell*, for the Plaintiff, submitted that if the Plaintiff had been born at the date of the will there would have been no question, and that when there was a gift to a class a child *en ventre sa mère* was considered as actually born, and was included in the class. The mention of the number three did not affect the right of the child *en ventre sa mère*, unless it could be held that it would be conclusive against the right of a child actually born. There was no allegation in the statement of claim that the testatrix knew there were no more than three children. In such a case the Courts considered that the number must be rejected, and that all the children of the class should take.

They referred to the cases of *Blasson* v. *Blasson* (1); *Pearce* v. *Carrington* (2); *Spencer* v. *Ward* (3); *Daniell* v. *Daniell* (4); *Goodfellow* v. *Goodfellow* (5).

Judgment.

HALL, V.C.:—

I am of opinion that none of the authorities referred to govern this case. The will and codicil in this case were both made before the birth of the Plaintiff. The gift is "to each of the three children of my niece," and if anybody had been asked at the date of the will how many children the niece had, the answer would have been three. If the gift had been to all her children, the child *en ventre sa mère* would have been included, and all four would have taken. The niece had three children actually in existence at the date of the will, and they must be taken to be the three whom the testatrix intended should have £1000 each.

(1) 2 D. J. & S. 665, 670, 688.
(2) Law Rep. 8 Ch. 969.
(3) Law Rep. 9 Eq. 507.
(4) 3 De G. & Sm. 337.
(5) 18 Beav. 356.

(1SC 10 Jur NS. 1113

V.-C. H. 1876 *In re* EMERY'S ESTATE. JONES *v.* EMERY.

There is, I consider, no ambiguity in this case. It may be observed that the testatrix uses the word "three" three times in the gift.

The demurrer must be allowed, and there must be a declaration that the three children born at the date of the will only are entitled.

W. Pearson, Q.C., referred to the case of *Sherer* v. *Bishop* (1).

Solicitors: *Redhead & Emmett*, agents for *J. Moody, Derby; Bloxams & Ellison*, agents for *J. Roberts, Bangor.*

V.-C. H. 1876 *July* 3.

RAWLINSON *v.* RAWLINSON.

[1875 R. 94.]

Will—Bequest of Furniture, &c., in Testator's Capital Messuage—Heirlooms—Furniture, &c., stored in another House included in the Bequest.

Testator bequeathed all his household furniture which should be in his capital messuage at his death, unto trustees upon trust to permit the same to be held and enjoyed as heirlooms with his said messuage by the person entitled to the same messuage under the will. The testator, who died in 1875, was, in 1874, the occupier of a house at *Bath*, which he had furnished. He ceased to occupy that house in 1874, and removed the furniture with the intention of its being placed in his capital messuage, which was in the occupation of a tenant. The tenant having declined to permit the furniture to be placed therein, it was, in consequence of such refusal, stored in farm buildings belonging to the testator, where it was at his death:—

Held, that the furniture passed under the bequest.

Statement.

FURTHER CONSIDERATION.

W. S. Rawlinson, late of *Duddon Hall, Cumberland*, who died in 1875, by his will, dated the 17th of October, 1872, after appointing executors and trustees and making some bequests, bequeathed as follows:—"All my household furniture, plate, glass, china, books, pictures, and articles of vertu, which shall be in my capital messuage called *Duddon Hall* at my death, unto my trustees, upon trust to permit the same to be held and enjoyed as heirlooms with my said capital messuage, as far as the rules of law and equity will permit, by the person for the time being entitled

(1) 4 Bro. C. C. 55.

to the same messuage by virtue of this my will, yet so that the same shall not vest absolutely in any person hereby made tenant in tail male or tail general by purchase of my said capital messuage, and who shall not attain the age of twenty-one years, but upon the death of such person under that age shall go and devolve to the person or persons who shall thereupon become entitled to the said capital messuage under the limitations of this my will."

Statement.

The usual administration decree was made on the 30th of July, 1875, when an inquiry was directed as to what household furniture, plate, glass, china, books, pictures, and articles of vertu, were in the testator's capital messuage called *Duddon Hall* at the time of his death, and were included in the gift of chattels bequeathed as heirlooms by the said will.

The Chief Clerk, by his certificate, dated the 6th of May, 1876, certified that there were certain articles of furniture, china, and pictures (the particulars of which were set forth in a schedule) belonging to the testator, which were not actually in *Duddon Hall* at the time of the testator's death, such articles having been removed in the year 1874 from a house at *Bath* occupied by the testator with the intention of removal to *Duddon Hall*, but were stored away in certain farm buildings at *Rawfold* belonging to the testator.

The evidence shewed that the testator took an unfurnished house at *Bath;* that *Duddon Hall* was let on lease as a furnished house, and that when the lease of the house at *Bath* expired in 1874, the testator was removing the articles of furniture, &c., to *Duddon Hall*, but the tenant declined to permit them to be placed in the house during his tenancy, and they were accordingly placed in store in the farm buildings.

Argument.

Dickinson, Q.C., and *Almaric Rumsey*, for the widow.

Bristowe, Q.C., and *T. Latham*, and *Hastings*, Q.C., and *Morshead*, for the other parties.

The cases of *Lord Brooke* v. *Earl of Warwick* (1) and *Land* v. *Devaynes* (2), and *Jarman* on Wills (3), were cited.

(1) 2 De G. & Sm. 425–436. (2) 4 Bro. C. C. 537.
(3) Vol. i. p. 722, n.

V.-C. H. 1876 RAWLINSON v. RAWLINSON.

HALL, V.C.:—

I am of opinion that all these articles of furniture, and other things mentioned in the schedule, passed under the bequest in the will.

Solicitors: *Tyler, Wickham, & Moberly; Johnston & Harrison,* agents for *Harrison & Son, Kendal.*

V.-C. H. 1876 *July* 14.

GARDNER *v.* COWLES.

[1869 G. 31.]

Bequest to an Infant—Trusts for Maintenance, Education, and Accumulation—Investment in Consols in names of Executors and Infant—Death of Executors—Trustee Act, 1850, *and Trustee Extension Act,* 1852—*Infant "Trustee" of the Consols.*

Testator bequeathed a legacy to each child, and directed his executors to stand possessed of his residuary estate in trust for all his children, the shares of those under age to be invested in consols, and paid to them at twenty-one or marriage. There were trusts for maintenance, education, and accumulation for the benefit of the infants. The executors invested the legacies and shares of two of the infants in consols in their own and the infants' names, and died leaving the infants surviving:—

Held, that the definition of "trustee" in the *Trustee Act*, 1850, sect. 2, included the case of consols which had been transferred into the name of an infant who was the sole beneficial owner of them, but subject to a direction in regard to maintenance or otherwise, vested in somebody else, and which direction could not in this case be practically performed so long as the consols remained in the name of the infant; and *ordered* that the infants be treated as trustees of the consols; and the legal personal representative of the last surviving trustee under the will was appointed to transfer the consols into Court.

Statement.

PETITION.

The testator, after bequeathing a legacy of £1000 to each of his children, directed his executors to stand possessed of his residuary estate in trust for all his children, the shares of such of them as should be under the age of twenty-one years at the time of his decease to be invested in the names of his executors in consols, and paid to such children, if sons, at the age of twenty-one years, and if daughters, at that age or marriage. The will contained

Statement.

trusts for maintenance, education, and accumulation for the benefit of the infant children. The executors converted the residuary estate, paid the legacies and shares of the children who had attained the age of twenty-one years, and invested the legacies and shares to which the two infant daughters were entitled in consols in the joint names of themselves and of the said infant daughters respectively. Both of the executors had died, leaving the two infant daughters surviving them. The Defendant was the administratrix of the last surviving executor. On the hearing of the cause certain inquiries were directed to be made.

On the 7th of December, 1875, it was, *inter alia*, ordered that the Plaintiffs should take such steps as might be necessary to bring the fund representing the two infants' legacies and shares into Court, and thereupon the Plaintiffs presented a petition under the Trustee Acts praying that each of the infants might be declared to be a trustee, within the meaning of those Acts, of the fund standing in her name and representing her legacy and share; that the right to transfer such funds might be vested in the Defendant; and that she might be directed to transfer the funds into Court in accordance with the order of the 7th of December, 1875; and on the 11th of February, 1876, Vice-Chancellor *Hall* made the order asked for.

July 14. The petition was now put in the paper to be mentioned, as the *Bank of England* had raised a question as to the regularity of the order of the 11th of February, 1876, which had not yet been passed and entered.

Argument.

W. Pearson, Q.C., and *E. Ward*, for the Petitioners, referred to the case of *Sanders* v. *Homer* (1), where a trustee transferred trust stock into the joint names of himself and his infant *cestui que trust*, and died, and it was held that the infant was a trustee within the *Trustee Act*, 1850, and within the 3rd section of the *Trustee Extension Act*, 1852, and an order was made vesting the right to transfer in the executors of the deceased trustee with the view of having it brought into Court. This case was much stronger, as the infant in *Sanders* v. *Homer* was absolutely entitled, and in this case there were trusts for maintenance, education,

(1) 25 Beav. 467.

(2) See W.N. (1876) 81: 24 W.R. 342.

V.-C. H. 1876 GARDNER. v. COWLES. Argument.

and accumulation. Though it might be said that those trusts applied only to the shares of the residue and not to the legacies, yet the answer would be that those shares and legacies were invested together and formed a common fund, and must be brought into Court to be dealt with in the administration of the testator's estate, as certain allowances for maintenance and education had been made out of that estate. In *Re Westwood* (1) the infant was absolutely entitled, and as there was no trust it was not a case for bringing the fund into Court. The *Bank of England* had raised an objection to the order, but the bank was indemnified by the 7th section of the *Trustee Extension Act*, 1852, which enacted, "that every order made .... under this or the *Trustee Act*, 1850, ... and duly passed and entered, shall be a complete indemnity to the *Bank of England* .... for any act done pursuant thereto; and it shall not be necessary for the *Bank of England* .... to inquire concerning the propriety of such order...." The order made in February was perfectly regular, it being clear the consols had got into wrong names; and that they ought to be transferred into Court.

Kekewich, for the *Bank of England*, submitted that the case of *Re Westwood*, where a similar order was discharged, ought to be followed, as the order in this case was irregular. The order directed that the consols should be transferred into Court to two separate accounts, and not to the credit of the cause, and therefore the contention that they ought to be brought into Court for administration purposes was erroneous. The bequests of the legacies were absolute, and the subsequent trusts in regard to maintenance, education, and accumulation, could not apply to them. In clause 2 of the *Trustee Act*, 1850, it was enacted that the words "'trust' and 'trustee' shall extend to and include implied and constructive trusts, and shall extend to and include cases where the trustee has some beneficial estate or interest in the subject of the trust;" but a person having the whole beneficial interest could not be a trustee for himself, and sect. 3 of the *Trustee Extension Act*, 1852, where power was given to the Court to make an order for the transfer or receipt of dividends of stock standing in the name of

(1) 6 N. R. 61, 316.

an infant trustee solely or jointly, did not apply to this case. Though the *Bank of England* might be indemnified by sect. 7 of the *Trustee Extension Act*, 1852, yet it had always been the custom to mention cases of doubt, and where a principle was involved, to the Court. The statutory indemnity referred to simple cases. The proper course, it was submitted, would be to make an order under the statute 11 Geo. 4 & 1 Will. 4, c. 65, s. 32, and as in the case of *Re Pongerard* (1).

W. H. Weldon, for the Respondent.

HALL, V.C. :— Judgment.

The definition of the word "trust" in sect. 2 of the *Trustee Act*, 1850, is, that it "shall not mean the duties incident to an estate conveyed by way of mortgage; but with this exception the words 'trust' and 'trustee' shall extend to and include implied and constructive trusts, and shall extend to and include cases where the trustee has some beneficial estate or interest in the subject of the trust, and shall extend to and include the duties incident to the office of personal representative of a deceased person;" and it appears to me that it is not an unreasonable or an unsound construction to hold that this definition of a "trustee" is sufficient to include the case of consols which have been transferred into the name of an infant who is the sole beneficial owner of them, but subject to some provision or direction in regard to maintenance or otherwise, which is vested in somebody else, and which provision or direction cannot, in the events that have happened, be practically operative or performed so long as the consols remain in the name of the infant. By the word "practically" I mean practically performed according to the intention of the creator of the disposition, though there may be some statutory provisions which may be resorted to for the purpose of accomplishing the same object in another form and mode. Where a fund has been so transferred, it is not unreasonable to hold that this definition extends to such a case, so as to allow the fund, through the machinery of the Acts of Parliament, to be brought back again into the name, and placed in the position it ought to be in, and

(1) 1 De G. & Sm. 426.

V.-C. H. 1876 GARDNER v. COWLES. Judgment.

would have been in, but for the irregularity or impropriety of putting it into the name of the infant. It appears to me that the clause in regard to maintenance and education has reference to all the provisions made for each particular infant; and consequently includes both legacies and shares of residue. I am of opinion, therefore, that neither the legacies nor the shares of residue ought to have been put into the names of the infants at all. They ought to have been invested so that, in all the events which might happen, the income of the funds might be received by persons who could receive it, which infants could not, in order that it might be applied in execution of the direction and trusts for maintenance and education contained in the will. It appeared to me that the proper course was to make an order by which the infants should be treated as trustees of the funds so transferred into their names, for the purpose of having the funds placed in the names in which they ought to be, *i.e.*, the names of the legal personal representatives of the last surviving trustee and executor. The order of the Court directed that the funds should be brought into Court and placed to certain accounts, and it still appears to me to be competent to the Court, acting within the scope and under the provisions of the Act of Parliament, to order that the funds be transferred into Court. Therefore, having declared that the infants are trustees within the meaning of the provision in the Act of Parliament, for the purpose of having a transfer of the funds into the names of the legal personal representatives of the last surviving trustee; and being of opinion that, instead of having the funds so transferred, they should be transferred into Court, I appoint the legal personal representative of the last surviving trustee and executor to make such transfer, and direct that the order made in February be dated as of to-day.

Solicitors: *T. Angell; Freshfields & Williams; F. W. Imbert-Terry.*

FAIRER *v.* PARK.

V.-C. H.

1876

March 13.

[1872 F. 22.]

Will—Construction—Bequest of "all my Personal Property"—Specific Bequest—Trust Estate—Bequests by Trustee to Tenants for Life absolutely—Satisfaction.

A gift by will by a testator to his wife of "all my personal property, all sums of money which I may possess or may be owing to me at the time of my decease, together with all the furniture, farming implements," and other things in the family mansion, is not specific.

A testator who had two sums of £1000 and £500 in his hands upon trust for his sisters *E.* and *A.* respectively for life, for their separate use, and after their deaths for their children equally, by his will desired that his real estate should be sold, and that two sums of £1000 and £500 should be paid to his sisters out of the proceeds of sale, and desired that the remainder of the proceeds of sale might be equally divided amongst other persons named :—

Held, that the gifts to the sisters were not a satisfaction of the moneys held by testator as trustee for his sisters and their children.

Statement.

GEORGE PARK, of *Asby Hall*, who died in December, 1871, by will in January, 1870, gave to his wife, *Agnes Park*, *Jons House* and all lands belonging to the same, and then proceeded thus:—"I also give and bequeath to my wife all my personal property, all sums of money which I may possess or may be owing to me at the time of my decease, together with all the furniture, farming implements, stock, and crop belonging to the *Asby Hall* estate; secondly, I desire that the whole, known as '*Asby Hall*,' and the lands belonging to that estate, may be sold after my decease, and that the sum of £1000 sterling be paid to my sister *Elizabeth Guy*, of *Asby*, and the sum of £500 sterling to be paid to my sister *Agnes Waller*, of *Hartley*, out of the proceeds of the sale of the aforesaid estate; thirdly, I desire that the remainder of the proceeds of the sale of the aforesaid estate may be equally divided between my nephews and nieces, and the daughter and sons of *Sarah Fairer*, of *Asby*," the four named; "these all to have in equal shares and proportions the remaining proceeds of *Asby Hall* estate after the payment of the aforenamed sums of money to my two sisters." By a codicil made in October, 1871, the testator appointed two executors (the Plaintiffs), and

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Statement.

desired that all his just debts, funeral and testamentary expenses, should be paid and satisfied by them.

George Park was the sole surviving trustee of the will of his father, *James Park*, who bequeathed to his wife *Esther* and to his son *George* £1500, upon trust as to £1000, part thereof, to pay the interest at £4 per cent. unto his daughter *Elizabeth Guy* for life, for her sole use and benefit, without being subject to the debts or control of her then or any future husband, and after her decease upon trust for her children at the age of twenty-one or daughters at marriage, with benefit of survivorship, share and share alike, and as to £500, part thereof, upon the like trusts in favour of his daughter *Agnes Waller* for her life, and for her children after her decease. *Esther Park* died in 1847. After her death *George Park* duly paid the interest of the two sums of £1000 and £500 to his said sisters, but the Plaintiffs believed that no sums were ever appropriated by him out of the estate of *James Park* to provide for those legacies. This suit was commenced for the administration of *George Park's* estate. A question arose whether the sums bequeathed by *George Park* to his sisters *Elizabeth* and *Agnes* were intended to be in satisfaction of the sums of £1000 and £500 bequeathed to them by the will of their father.

As to the £500 (part of the £1500) the Chief Clerk certified that it was a debt due from the testator's estate together with interest at £4 per cent. from the 4th of August, 1871. He also certified that *Esther Park* assented to the legacies of £1500 under the will of *James Park*, and in January, 1832, handed over to *George Park* certain securities and moneys amounting in value to £1500, which he converted into cash and retained and applied the same to his own use; and the Chief Clerk submitted to the Court whether the desire in *George's* will amounted to a bequest of legacies of £1000 and £500 to his sisters, or whether it was more than a direction to pay the debt referred to, in the proportions in which his sisters were interested.

It was stated in the answer of Mrs. *Waller* that on the 29th of February, 1868, *George Park* gave a memorandum that he had that day paid to *Agnes Waller*, his sister, the sum of £10 due the 2nd of February, 1868, being half-year's interest on the sum of

£500 which he had in his hands belonging to the said *Agnes Waller*, or owing by him to her.

Ince, Q.C., and *Everitt*, for the Plaintiff's executors, stated the facts.

Eddis, Q.C., and *Heysham*, for the Defendant *Agnes Park*, submitted that as *George Park* knew that he was liable to pay the sums of £1000 and £500 to his sisters, the sums which he gave by his will to them were in satisfaction of the debts so far as they were concerned; but they might not be considered to be in satisfaction of the claims of their children. In *McCarogher* v. *Whieldon* (1) a question of election (2) arose, and the doctrine laid down there would apply to the two sisters in this case. Assuming that the gifts of £1000 and £500 were not in satisfaction of the debts of those amounts, the payments which might be ordered to be made ought not to come out of the testator's personal estate, as that had been specifically given to *Agnes Park*.

They referred to *Vaughan* v. *Buck* (3) and *Bethune* v. *Kennedy* (4), and *Sutherland* v. *Cooke* (5), which was distinguished from the present case.

Morgan, Q.C., and *Daniel Jones*, for a Defendant in the same interest, submitted that this was simply a question of the testator's intention; that the memorandum of the 29th of February, 1868, was clearly admissible to shew what that intention was; and that the testator, knowing that he was indebted as to the two sums mentioned in his will, made a provision in satisfaction of the claims, and not as bounty to his sisters. They referred to *Campbell* v. *Campbell* (6); *Alleyn* v. *Alleyn* (7); *Bartlett* v. *Gillard* (8); *Atkinson* v. *Littlewood* (9); *Edmunds* v. *Low* (10); *Cole* v. *Willard* (11); *Pinchin* v. *Simms* (12); *Wathen* v. *Smith* (13); *Charlton* v. *West* (14); *Bensusan* v. *Nehemias* (15).

(1) Law Rep. 3 Eq. 236.
(2) Page 244.
(3) 1 Ph. 75.
(4) 1 My. & Cr. 114.
(5) 1 Coll. 498.
(6) Law Rep. 1 Eq. 383.
(7) 2 Ves. Sen. 37.
(8) 3 Russ. 149.
(9) Law Rep. 18 Eq. 595, 607.
(10) 3 K. & J. 318.
(11) 25 Beav. 568.
(12) 30 Ibid. 119.
(13) 4 Madd. 325.
(14) 30 Beav. 124.
(15) 4 De G. & Sm. 381.

V.-C. H. 1876 FAIRER v. PARK. Argument.

Townsend, for the Defendant *George Park,* referred to *Edmunds* v. *Low* (1).

Dickinson, Q.C., and *Speed,* for Mr. and Mrs. *Guy* :—

[HALL, V.C.:—The only question on which I wish to hear any argument is, whether there was a specific gift to *Agnes Park.*]

We contend that as there was by the codicil, by which executors were appointed, an express direction to pay all the debts, funeral and testamentary expenses, the sums owing by *George Park* as trustee must be paid out of his personalty.

Dryden, for the Defendants *Fairer.*

Dundas Gardiner, for the children of Mr. and Mrs. *Guy.*

Smart, for Mrs. *Waller* and her children.

Eddis, in reply.

Judgment.

HALL, V.C.:—

8 Ap. Cas 815

I am of opinion that upon the true construction of this will there is not a specific gift of "all sums of money which I may possess, or may be owing to me at the time of my decease, together with all the furniture, farming implements, stock, and crop belonging to the *Asby Hall* estate," to the Defendant *Agnes Park.* The dispositions are, first of all, a gift of "all my personal property," and then the words which I have read are thrown in, not for the purpose of making anything specific, but for the purpose of preventing the possibility of a question arising as to the specified things being included under the terms "all my personal property." The testator immediately afterwards disposed of the *Asby Hall* estate, and as he perhaps imagined that some of the things given to his wife might go with the estate, he used words which shewed that he meant they should go as personal estate, and be included in his general personal property, and I cannot say that that is sufficient to enable me to hold that those and the other specified things, which are mixed up with the general gift of per-

(1) 3 K. & J. 318. 3 Jur N.S. 309

sonalty, were given specifically. As to the question, whether the testator, who owed to his two sisters and their children moneys which came into his hands, satisfied those debts by gifts of sums to his two sisters absolutely, the gifts to them are of £1000 and £500 out of the proceeds of sale of the testator's real estate, the surplus of those proceeds being given to other parties. That is a circumstance which is not unimportant, though I do not think that in its absence I should have arrived at a different conclusion. The £1000 in the testator's hands for one sister was held by him upon trust to pay the income to her "for life for her sole use and benefit, without being subject to the debts or control of her then or any future husband, and after her decease, upon trust for her children at the age of twenty-one, or daughters at marriage," share and share alike; and as to the £500, he held it upon like trusts for his other sister and her children. The £1000 mentioned in the testator's will is a simple gift of that sum, not as trustee, and not in any way referred to as being due, and owing by him as trustee, or as being in satisfaction of the gift which he held in trust. It is not given to her for her sole and separate use, and therefore her husband became entitled to it in her right without any trust attaching to it. There is a great difference in that respect, and there is also a difference in respect of the £1000 given by the will of *James Park* being a life interest, and the corpus being given to the children. These are differences so material, that any presumption which might have existed in favour of the gift of £1000 being in satisfaction of the debt so called is rebutted. There is no authority which shews that I ought to hold that the one gift ought to be taken in lieu of the other. The case of *Campbell* v. *Campbell* (1) was decided upon the ground that there were double portions; and in *McCarogher* v. *Whieldon* (2), a father, who had covenanted to do certain things, by will or otherwise, in favour of a son and his family, by will made a disposition for the benefit of all his five children, and it was held to be a satisfaction as regarded the son, but not as regarded the son's wife and children.

The other cases referred to have reference to gifts for separate use. What I have said as to the difference in the gifts in this case

(1) Law Rep. 1 Eq. 383. (2) Law Rep. 3 Eq. 236.

V.-C. H. 1876 FAIRER v. PARK. Judgment.

would, in my judgment, be sufficient without the aid of the difference as to the separate use in the one gift and not in the other. At all events the gift to the separate use in one case is not unfavourable to the conclusion at which I have arrived. Assuming that the separate use alone would not be sufficient, still it is a circumstance which must be taken into consideration. This case seems to me to be within the principle stated by the Master of the Rolls in *Fourdrin* v. *Gowdey* (1), where he said it was "a question, not of satisfaction, but performance," and also within the cases of *Rowe* v. *Rowe* (2), in which Sir *J. L. Knight Bruce* referred to Lord *Lyndhurst's* observation in *Bartlett* v. *Gillard* (3), that the circumstance of the gift of one annuity being for separate use and another not was a material fact; and *Edmunds* v. *Low* (4), where *Rowe* v. *Rowe* was referred to by Vice-Chancellor *Page Wood*. In my opinion these legacies cannot be held to be a satisfaction of the liabilities of the testator under the will of *James Park*, and therefore there must be a declaration to that effect.

Solicitors: *Gray & Mounsey*, agents for *E. Heelis*, Jun., *Appleby*; *W. H. Tattam*, agent for *T. H. Preston*, *Kirkby Stephen*; *Nicol, Son, & Jones*, agents for *Bleaymire & Shepherd*, *Penrith*, and also for *G. R. Thompson*, *Appleby*; *J. C. Rutter & Son*, agents for *Cant & Fairer*, *Penrith*.

(1) 3 My. & K. 383, 410.
(2) 2 De G. & Sm. 294, 298.
(3) 3 Russ. 149.
(4) 3 K. & J. 318.

In re BENNETT. *Ex parte* GLAVE.

C. J. B.
1876
July 3.

Liquidation—Summoning Debtor for Examination—Default in giving Information to Trustee—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 96, 125 —*Bankruptcy Rules*, 1870, *rr.* 171, 301.

The trustee under a liquidation cannot summon the debtor in a summary way for examination under sect. 96 of the *Bankruptcy Act*, 1869.

He must first make out a *primâ facie* case of default by the debtor under rule 301 of the Bankruptcy Rules, 1870, and the debtor is then entitled to be heard on the question whether the summons should issue.

Rule by Ch. of Ch. 5 Ch. D. 145.

Statement.

THIS was an appeal from a decision of the Judge of the *Leeds* County Court.

In April, 1875, *J. E. Bennett* and *J. Glave*, who were cloth merchants at *Leeds*, filed a liquidation petition. The creditors resolved on a liquidation by arrangement, and appointed *J. W. Close* trustee. In May, 1876, the trustee applied *ex parte* to the County Court for a summons against *Glave*, under sect. 96 of the *Bankruptcy Act*, 1869, to attend at the Court on the 24th of May to give evidence. The application was expressed to be made on the ground that *Glave* was suspected to have in his possession a quantity of cloth of considerable value for which he had not accounted to the trustee, and to have received several sums of money on account of the firm on the day on which the liquidation petition was signed, which he had not accounted for to the trustee, and that he was capable of giving information respecting the debtors, their trade dealings, and property. An affidavit was filed in support of the application.

The summons was issued. *Glave* filed an affidavit denying the allegations of the trustee. He attended the Court at the time appointed and was sworn, but, under the advice of his solicitor, he refused to answer any questions. The ground of his refusal was that sect. 96 does not apply to liquidation by arrangement. The Judge thereupon made an order committing *Glave* for contempt of Court, but directed that it should not be enforced until after the 5th of July, with the view of enabling *Glave* to take the opinion of the Chief Judge. *Glave* appealed.

C. J. B.
1876
In re BENNETT. *Ex parte* GLAVE.
Argument.

Winslow, Q.C., and *Tindal Atkinson*, for the Appellant:—

Sect. 96 of the *Bankruptcy Act*, 1869, does not apply to liquidation by arrangement. At any rate, before a summons can issue the trustee must shew that the debtor has, under rule 301 of the Bankruptcy Rules, 1870, made default in giving information to him.

[They referred to the *Bankruptcy Act*, 1869, s. 125; Bankruptcy Rules, 1870, rr. 171, 301; *In re Webb* (1).]

Bagley, for the trustee.

Judgment.

BACON, C.J.:—

It must be shewn that there has been a default on the part of the debtor. Before he can be summoned for examination there must be a *primâ facie* case made against him that he has failed to comply with the requisitions of the trustee. The matter must go back to the County Court, with liberty for the trustee to file an affidavit to shew that there has been a default. The debtor must have an opportunity of answering this, and he is entitled to be heard upon the application for the summons. Meanwhile the operation of the order must be suspended.

Solicitor for Debtor: *T. Noton.*
Solicitors for Trustee: *Torr & Co.*

(1) 2 Ch. D. 326.

Overruled. BARRATT v. GOUGH-THOMAS [1951] 1 Ch. 242

In re MESSENGER. *Ex parte* CALVERT.

C. J. B.
1876
July 10.

Solicitor's Lien—Title-Deeds held for Mortgagor and Mortgagee—Bankruptcy of Mortgagor—Sale of Equity of Redemption by Trustee—Right of Solicitor to retain Costs out of Purchase-Money.

A solicitor was instructed to prepare a mortgage, and the title-deeds of the property were deposited with him for this purpose by the mortgagor. He was also acting as solicitor for the mortgagee, and when the mortgage was executed he continued to hold the deeds on behalf of the mortgagee. The mortgagor filed a liquidation petition, and the solicitor was employed on behalf of the trustee. The trustee sold the equity of redemption, and the solicitor received the purchase-money :—

Held (reversing the decision of the County Court Judge), that the solicitor had a lien on the deeds against the mortgagor, and was entitled to retain out of the purchase-money the amount of costs due to him from the mortgagor.

4 Ch D 517. 16 Ch D 731. 16 Ch D 619

Statement.

THIS was an appeal from a decision of the Judge of the *Scarborough* County Court.

Joseph Messenger, a provision dealer at *Scarborough*, filed a liquidation petition on the 15th of July, 1875, under which *James Fisher* was appointed trustee. Mr. *F. W. Calvert* was appointed solicitor to the trustee. *Calvert* had acted as solicitor for the debtor. Some time before the liquidation the debtor instructed *Calvert* to prepare a mortgage of some freehold property belonging to him, and deposited with him the title-deeds of the property for that purpose. *Calvert* also acted as solicitor for the mortgagees, and after the mortgage was completed he held the deeds on their behalf. The trustee instructed *Calvert* to sell the mortgaged property subject to the mortgage, and the equity of redemption was accordingly sold for £114 2*s.* 9*d.* This sum was received by *Calvert* from the purchaser, and he claimed to retain out of it £80 5*s.* 1*d.* for costs due to him from the debtor in respect of the preparation of the mortgage and other matters. *Calvert* claimed a lien upon the deeds as against the debtor for this amount, and he retained it out of the £114 2*s.* 9*d.*, handing over only the balance of £33 17*s.* 8*d.* to the trustee. The Judge was of opinion that *Calvert* was not entitled to the lien which he claimed, and ordered him to pay the £80 5*s.* 1*d.* to the trustee. *Calvert* appealed.

Rel. sed Re Snell 6 Ch D. 105

C. J. B.
1876
In re MESSENGER. *Ex parte* CALVERT.
Argument.

De Gex, Q.C., and *J. T. Humphry*, for the Appellant:—

The County Court Judge thought that by selling the equity of redemption for the trustee the Appellant had lost his lien. His Honour held that the property in the deeds had passed to the trustee, and that the solicitor had no lien upon the money of his client. We contend that the solicitor had a general lien for his costs on the deeds: *Colmer* v. *Ede* (1); and that he is now entitled to deduct his costs from the purchase-money. If the debtor had paid off the mortgage he could not have got the deeds from his own solicitor without satisfying his lien, and the trustee is in the same position. When the equity of redemption was sold a good title could not be made to the purchaser without satisfying the lien. Subject to the mortgage the solicitor had a lien on the deeds, and at the commencement of the liquidation the deeds were in his possession. The property in the deeds passed to the trustee subject to the mortgage and to the solicitor's lien.

Bagley, and *Finlay Knight*, for the trustee:—

We admit that the solicitor had a general lien so long as he held the deeds for the debtor, but he ought to have discharged his lien on the creation of the mortgage. After the creation of the mortgage he held the deeds for the mortgagee. The fact that he happened also to be the mortgagor's solicitor made no difference. The trustee might have redeemed the deeds upon paying off the mortgage debt, and the mortgagee, when that was done, could have insisted upon the deeds being restored.

Judgment.

BACON, C.J.:—

The facts of this case are a little complicated, but when close attention is given to them there is no difficulty in understanding them. It is not disputed that in the first instance Mr. *Calvert* held the deeds for the mortgagor, and that he had a lien upon them for his costs. But it is said that when the mortgage was made he in effect parted with the deeds. As a matter of fact he did not, for he holds them still. The law is clear that a person who from his position has a right of lien, does not lose that right

(1) 40 L. J. (Ch.) 185; 19/102/8; 111/18/0
270

unless there is some special agreement that he shall do so. No such agreement is alleged in the present case. Is not then the result this, that the property was subject to the mortgage and also to the solicitor's lien? *Colmer* v. *Ede* (1) is a distinct authority, and indeed it is admitted, that the solicitor originally had a general lien on the deeds. Then I ask in what way has he parted with his lien? The trustee, in the discharge of his duty, sold the equity of redemption. The purchaser could have enforced the contract for sale, and if he had made a claim for specific performance the Court would have required that every incumbrance upon the property should be cleared away for the purpose of making a good title to the purchaser. The mortgagee, when called upon to reconvey the estate, would have been justified in saying to the mortgagor, I will take my money and convey the estate, but the deeds I cannot give you, because, not by any act of mine, they are not mine to give; but they are subject to your solicitor's lien. Your solicitor claims a lien upon them, not as against me, but as against you, and I cannot deprive him of it. Nothing has happened to deprive Mr. *Calvert* of the lien which he originally acquired, though the amount of it may have to be the subject of inquiry and taxation.

Solicitors for Appellant: *Iliffe, Russell, & Iliffe,* agents for *W. B. Richardson, Scarborough.*

Solicitors for Trustee: *Spurr & Nethersole,* agents for *Cornwall & Watts, Scarborough.*

(1) 40 L. J. (Ch.) 185; 19 W.R. 316; 24 W.R. 270.

C. J. B.

1876

June 19.

In re BUNNETT. *Ex parte* JEAVONS.

Concurrent Bankruptcy and Liquidation Petitions—Liquidation resolved upon—Costs of Petitioning Creditor—Bankruptcy Rules, 1870, *rr.* 31, 186.

A bankruptcy petition was presented against a debtor. Before the hearing he filed a liquidation petition. The hearing of the bankruptcy petition was several times adjourned, to await the result of the proceedings under the liquidation petition. Ultimately a liquidation was resolved upon, and the bankruptcy petition was then dismissed :—

Held, that the petitioning creditor was entitled to be paid in priority, out of the estate, the costs of his petition, including therein the costs of and incident to a debtor's summons on which the petition was founded, and the costs of the adjournments of the hearing.

Statement.

THIS was an appeal from a decision of the Judge of the *Greenwich* County Court.

On the 4th of February, 1876, *George Jeavons* served a debtor's summons on *A. H. Bunnett*, a shutter manufacturer at *Deptford*. *Bunnett* applied to have the summons dismissed, and on the 18th of February his application was dismissed with costs. On the 21st of February *Jeavons* presented a bankruptcy petition against *Bunnett*, founded on his non-compliance with the debtor's summons. The 7th of March was fixed for the hearing of the petition. On the 2nd of March *Bunnett* filed a liquidation petition. On the 7th of March the hearing of the bankruptcy petition was adjourned by the Registrar to the 24th of March, and it was ordered that the costs of the Petitioner, of the petition, and of that sitting, should be a first charge on the debtor's estate, as if he had that day been adjudicated a bankrupt. On the 21st of March the first meeting of the creditors was held under the liquidation petition, and it was resolved to accept a composition. On the 24th of March the hearing of the bankruptcy petition was again adjourned until the 4th of April, after the second meeting of the creditors. At the second meeting of the creditors the resolution for a composition was not confirmed, but a liquidation by arrangement was resolved upon. On the 4th of April the hearing of the bankruptcy petition was again adjourned, and on the 11th of April, the liquidation resolution having been registered, the bankruptcy petition was

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dismissed. The solicitor of the petitioning creditor then carried in his bill of costs for taxation, and the Registrar disallowed all the costs relating to the debtor's summons, and the costs of the adjournments of the hearing of the bankruptcy petition subsequent to the 7th of March, and of its dismissal. The Registrar thought that the costs of the debtor's summons ought to be proved in the liquidation, and that the costs of the adjournments were in his discretion.

The Judge refused an application to review the taxation. The petitioning creditor appealed.

Argument.

S. Woolf, for the Appellant:—

Though there is no express provision in the Bankruptcy Rules, 1870, it is the practice in the *London* Court to allow the costs of a debtor's summons as part of the petitioning creditor's costs of the petition. A debtor's summons is a preliminary step to a petition.

[He was stopped by the Court.]

D. L. Alexander, for the trustee:—

Rule 31 (1) does not apply, as no adjudication was made. The costs in question can be allowed, if at all, only under the general jurisdiction conferred by rule 186 (2). Even rule 31 would not include the costs of the debtor's summons. But, in truth, the order of the 7th of March was made because rule 31 does not apply, and that order does not extend to the costs which the Registrar has disallowed.

Judgment.

BACON, C.J.:—

In my opinion the Appellant is entitled to all the costs which have been disallowed. They are all costs of the proceedings. The Registrar's order must be discharged, and the matter be

(1) Rule 31: "The petitioning creditor shall, at his own costs, file and prosecute his petition and the proceedings under any order of adjudication made thereon, until the appointment of a creditors' trustee; and the Court shall make order for the payment of such costs out of the first net proceeds of the estate of the bankrupt."

(2) Rule 186 provides (*inter alia*): "The Court may in all matters before it award such costs as to it shall seem fit and just."

By rule 188, "All costs shall be in the discretion of the Court."

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referred back to him to review his taxation. The Appellant must have his costs of the application to the County Court, but I cannot give any costs of the appeal.

Solicitor for Appellant: *J. H. Crump.*
Solicitors for Trustee: *Champion, Robinson, & Poole.*

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In re DALE. *Ex parte* DALE.

Bankruptcy Petition—Omission of Debtor to give Notice of Intention to oppose—Adjudication—Costs—Bankruptcy Rules, 1870, *rr.* 36, 37, 38.

13 Ch D. 822.

A debtor against whom a bankruptcy petition had been presented instructed his solicitor to oppose it. The solicitor inadvertently omitted to give the notice required by rule 36 of the Bankruptcy Rules, 1870, but he appeared at the hearing of the petition, and asked to be allowed to dispute the validity of the petitioning creditor's debt. The Registrar refused to permit this, and made an adjudication:—

Held, that the debtor ought to have been allowed to adduce his evidence, and that the adjudication must be annulled, but that the debtor must pay the costs occasioned by the omission to give the notice.

Statement.

THIS was an appeal from a decision of the Deputy Registrar of the *King's Lynn* County Court, acting as Judge.

A bankruptcy petition was presented against *William Dale*. He instructed his solicitor to attend on his behalf at the hearing of the petition, and to oppose the making of an adjudication, and in particular to dispute the validity of the petitioning creditor's debt, which he alleged to have been contracted fraudulently. Through inadvertence, the solicitor omitted to give the three days' notice required by rule 36 of the Bankruptcy Rules, 1870, of the debtor's intention to dispute the debt. The solicitor attended the Court at the time fixed for the hearing, and asked for leave to dispute the debt notwithstanding the omission to give the notice. The Registrar refused the application, and declined to adjourn the hearing of the petition on any terms, and he made the adjudication. *Dale* appealed. He deposed that until the day before that appointed for the hearing of the petition he was ignorant that it was necessary for him to give any notice of his intention to dispute the

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debt, and his solicitor deposed that it was by pure inadvertence on his part that the notice was not given.

Bagley, for the Appellant:—

The Appellant ought to have had an opportunity of disputing the debt. The object of rule 36 (1) is to enable the petitioning creditor to have his witnesses in attendance. Rule 37 shews that an adjudication is not to be made in this summary way, except when the debtor does not appear at all. It is a mere question of costs.

Finlay Knight, for the petitioning creditor.

Judgment.

BACON, C.J.:—

The proceedings appear to have been taken hastily. The order must be discharged and the adjudication annulled, but the Appellant must pay the costs occasioned by the inadvertence.

Solicitors: *Learoyd & Co.*

(1) Rule 36: "Where a debtor intends to shew cause against a petition he shall file a notice with the Registrar, shewing the statements in the petition which he intends to deny or dispute, and transmit by post to the petitioning creditor a copy of the notice three days before the day on which the petition is to be heard."

Rule 37: "If the debtor does not appear at the hearing, the Court may make adjudication without further proof of the statements in the petition, if it shall think fit."

Rule 38: "On the appearance of the debtor to shew cause against the petition, the petitioning creditor's debt, trading, and act of bankruptcy, or such of those matters as the debtor shall have given notice that he intends to dispute, shall again be proved, and if any new evidence of those matters, or any of them, shall be given, or any witness or witnesses to such matter shall not be present for cross-examination, and further time shall be desired to shew cause, the Court shall, if it think the application reasonable, grant such further time as it may think fit."

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July 21.

In re BARRAND. *Ex parte* COCHRANE.

Bill of Sale—Registration—First Bill of Sale not registered—Second Bill of Sale of same Property registered—Bankruptcy of Mortgagor—Rights of Trustee —Bills of Sale Act, 1854, s. 1.

6QBD668
18ChD28

A bill of sale of chattels was executed, but was not registered. The mortgagor executed a second bill of sale of the same chattels to another person, which was registered. Afterwards the mortgagor filed a liquidation petition:—

Held, that the second mortgagee was entitled to such of the chattels as had not been seized before the liquidation by the first mortgagee.

Affirmed in C. A. 4ChD.230

Statement.

THIS was an appeal from a decision of the Judge of the *Nottingham* County Court.

On the 27th of March, 1875, *Robert Barrand*, a farmer at *Bradmore, Nottinghamshire*, who was not a trader, executed a bill of sale to *Abraham Collins* of his farming stock, furniture, and other chattels, to secure the payment of £130. This bill of sale was never registered. On the 24th of June, 1875, *Barrand* executed a bill of sale of the same property to *A. S. Cochrane* to secure £200. This bill of sale was duly registered. On the 26th of February, 1876, *Collins*, under the provisions of his bill of sale, seized some of *Barrand's* stock, and other goods, and later on the same day *Barrand* filed a liquidation petition. *Collins* sold the property which he had seized, but did not realize enough to satisfy his debt. The trustee appointed under the liquidation petition took possession of the rest of the debtor's goods, and sold them. *Cochrane*, to whom £150 remained due upon his bill of sale, claimed to be paid this debt out of the money which the trustee had realized by the sale. The Judge refused his application for payment, and he appealed.

Argument.

Winslow, Q.C., and *Henry Kisch*, for the Appellant:—

The County Court Judge held that by reason of the previous bill of sale to *Collins* no property in the goods passed to *Cochrane* under his bill of sale. The first bill of sale, however, not having been registered, was void as against the trustee, except so far as possession was taken under it. How could a void unregistered bill

of sale affect the validity of a subsequent bill of sale which was duly registered? The County Court Judge misapprehended the effect of *Maugham* v. *Sharpe* (1) and *Edwards* v. *English* (2). The latter case is really in our favour, reading "trustee" for "execution creditor." If the first bill of sale is set aside, it is set aside for all purposes. *Nicholson* v. *Cooper* (3) only shews that *Collins* could not have set up *Cochrane's* bill of sale against the trustee. *Richards* v. *James* (4) is an authority for us. It shews that *Collins'* security is gone altogether by reason of the liquidation. The effect is the same as if he had been paid off; the second bill of sale would then have taken effect.

Finlay Knight, for the trustee:—

The point now raised has never yet been decided; the cases cited related to execution creditors, not to a trustee in bankruptcy. The *Bills of Sale Act* provides that an unregistered bill of sale shall be void as against a trustee in bankruptcy, *i.e.*, void for the benefit of the creditors generally of the mortgagor. The contention of the Appellant is that the avoiding of the bill of sale operates, not for the benefit of the creditors, but for the benefit of a person, who, if there had been no bankruptcy, would have had no title. The Appellant's claim is to be satisfied out of goods which the trustee has recovered by virtue of his own title. The bankruptcy has entitled the trustee to take away from *Collins* that which was otherwise his. The claim of the second mortgagee must, at any rate, be subordinate to that of the first. None of the cases cited really touch the point, except *Richards* v. *James*. But there the execution creditor had been barred, and did not appeal, and the only question was as between the two bill of sale holders.

BACON, C.J.:— Judgment.

There seems to have been some confusion in the view taken by the County Court Judge of the position of the parties. *Collins* had the first bill of sale, and under it he took possession of a part of *Barrand's* goods. The trustee under the liquidation came in and

(1) 17 C. B. (N.S.) 443. (3) 3 H. & N. 384.
(2) 7 E. & B. 564. (4) Law Rep. 2 Q. B. 285.

C. J. B. 1876 *In re* BARRAND. *Ex parte* COCHRANE. Judgment.

defeated him. *Collins* is not a party to the present litigation; he has had nothing to do with it. The trustee took possession of goods which were subject to a mortgage created by a good registered bill of sale in favour of *Cochrane*. The trustee could only take the interest of the debtor, and if he has sold the goods the money arising from the sale belongs to the second mortgagee, so far as may be necessary to satisfy his debt. The trustee has possessed himself of goods which had been lawfully assigned to the present Appellant. What has taken place to defeat his rights? For the present purpose *Collins* is entirely out of the way. Whatever rights he had have been either satisfied or defeated. The cases which have been referred to have nothing to do with the question which I have now to decide. It must be ascertained in the County Court how much is due to the Appellant, and he has a right to be paid what is due to him out of the proceeds of the sale.

Solicitor for Appellant: *J. Seymour Kisch.*

Solicitors for Trustee: *Taylor, Hoare, & Co.*, agents for *E. H. Fraser, Nottingham.*

MADDY *v.* HALE.

C. A.
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V.-C. M.
Feb. 25.
C. A.
June 1, 24;
July 11.

[1853 M. 119.]

Ecclesiastical Leases—Trust to renew out of Income—Impossibility of Renewal—Tenant for Life—Enjoyment in Specie.

A testator gave to his trustees a tithe rent-charge held under an ecclesiastical lease for twenty-one years, which was in practice renewed every seven years on payment of a fine, upon trust to renew out of the proceeds, and to apply the surplus in a certain way during the life of his wife, and directed that after her death it should form part of his residuary estate. He gave his trustees power at any time to sell the leasehold interest.

The lease having ceased to be renewable:—

Held, by *Malins*, V.C., that the persons interested during the life of the widow were entitled to receive the rent-charge free from any deductions for raising a renewal fund; and that a renewal fund which had been raised out of the income, but could not be applied for renewal, must be paid to the persons entitled to the income:

Held, on appeal, that the leasehold interest ought to be sold and the proceeds invested, and only the income of this fund and of the renewal fund applied as income.

Tardiff v. *Robinson* (1) distinguished.

Statement.

THE late *John Maddy*, D.D., who died on the 17th of June, 1853, by his will, dated the 16th of June, 1851, gave to trustees his share of the great tithes, or commutation rent-charge in lieu of tithes, arising out of the parishes of the *Holy Trinity* and *St. Mary* in *Ely*, to which he was entitled under a lease from the Dean and Chapter of *Ely*, upon trust to renew the said lease from time to time out of the proceeds of the said tithes, and to divide the surplus annually during the life of his wife equally between her and his four grandchildren, whom he named, and after the decease of his wife he directed that the tithes should become part of his residuary estate. He empowered his executors at any time after his decease, if they saw fit, to sell the said tithes or rent-charge, and to invest the money arising therefrom in the Three per Cents. He gave his residuary estate equally among the above four grandchildren and two others viz the Rev. [illegible] of the Lord.

The suit was instituted for the administration of Dr. *Maddy's*

(1) 27 Beav. 629, n.

C. A. 1876 MADDY v. HALE. Statement.

estate. At the time of his death he was equitably entitled to one equal tenth share in the Rectory of *Holy Trinity* and *St. Mary* in *Ely*, and the Chapel of *Chettisham*, and certain glebe lands and tithe rents-charge, for the residue of a term of twenty-one years, commencing from the 29th of September, 1838, the entirety being vested in trustees upon trusts for obtaining the renewal of the lease from time to time, and for raising out of the rents and profits derived from the property leased or by mortgage the necessary fine for renewal, and subject thereto, in trust for certain persons in certain shares, of which Dr. *Maddy* was entitled to one tenth share.

This lease was in practice renewed once every seven years, on a surrender of the previous lease and on payment of a fine.

The order on further consideration in the suit, which was dated the 20th of April, 1857, directed that, after retaining during the years 1855, 1856, 1857, 1858, and 1859, such a sum as would be sufficient to provide a fund for the renewal of the lease, the surplus income should be applied in the manner provided by the will, and that after the year 1859 the whole of the surplus of the rent-charge should be divided in the same way, without any deduction for renewals, until the further order of the Court, and liberty was given to apply to the Court for directions as to such parts of the estate as might be outstanding.

The trustees of the lease renewed it in 1859, the accumulated fund being applied towards that object. The trustees under the will continued, without any further direction from the Court, to set apart a renewal fund, with the aid of which a further renewal was effected in 1866, and since that time they had accumulated another fund, now represented by £1003 6*s.* 7*d.* consols.

Subsequently to the year 1866 the reversion of the lease became vested in the Ecclesiastical Commissioners, and they declined to allow any further renewals, and there was no right of renewal as against them.

The present Petitioner, who was one of the Plaintiffs and interested in the property which would become distributable on the death of the testator's widow, and was also one of the trustees under the will, now presented this petition, asking that the accumulated fund might be transferred into Court, and that, after pay-

ment of the costs of the petition thereout, the residue might be treated as corpus, and the income applied as in the will, and that the lease might be sold and the proceeds invested and treated as corpus, and the income applied in the same way.

The petition came on for hearing before Vice-Chancellor *Malins* on the 25th of February, 1876.

Argument.

Langworthy, for the Petitioner:—

This is not a mere power, but a trust for renewal of the lease. If it had continued to be renewable, it would have been the duty of the trustees to set apart a fund for the purpose of renewing. It would be unreasonable that the tenant for life should derive a benefit from an event which has diminished the reversionary value of the estate. The proper course is to have the fund permanently invested, and so let the loss be apportioned between those interested for life and those in remainder. The same point has in fact been decided in *In re Wood's Estate* (1), which was followed in *Hollier* v. *Burne* (2), which in principle governs the present case.

The Court is now in the place of the trustee of a trust for sale, which overrides the interests of the beneficiaries.

Collier, for another of the persons interested in reversion only:—

In re Money's Trust (3) shews the distinction between a mere power and a trust such as there is here.

Berkeley, for parties interested both ways, did not argue the point.

Glasse, Q.C., and *F. Vaughan Hawkins* and *Dunning*, for parties interested during the life of the widow only:—

The questions raised on this petition have been already decided. In *Tardiff* v. *Robinson* (4), on which *Morres* v. *Hodges* (5) was founded, there was, as here, an express trust to renew, and the renewal having become impossible, the tenant for life was held to be entitled to the enjoyment of the entire income in specie. In *Hayward* v. *Pile* (6), on appeal, the Court refused to sanction an

(1) Law Rep. 10 Eq. 572.
(2) Ibid. 16 Eq. 163.
(3) 2 Dr. & Sm. 94.
(4) 27 Beav. 629, n.
(5) Ibid. 625.
(6) Law Rep. 5 Ch. 214.

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arrangement as to ecclesiastical leases which had ceased to be renewable, on the ground that the effect would be to diminish the income of the tenant for life. But the point in question is really disposed of by the order on further consideration, which expressly directs the payment of the income to be made without deducting a fund for renewal. *In re Wood's Estate* (1) is not really contrary to *Morres* v. *Hodges* (2). It was only a case of interim investment, and it left open the power to apply for a permanent investment. The Petitioner has created the difficulty by accumulating a fund contrary to the order of the Court, which ought to have been paid to the persons having the life interest.

Hull, and *Millar*, for other parties similarly interested.

Langworthy, in reply.

Judgment, V.-C. M.

MALINS, V.C.:—

This petition raises a point of very considerable importance to persons holding property on ecclesiastical leases which were ordinarily renewed from time to time, and were considered to be perpetually renewable. The Legislature, however, interfered, and the result was that these leases were no longer renewable, and persons who believed they had as good an estate as a fee simple found themselves in the position of being simply leaseholders for short terms. The consequence of the previous practice as to renewal was, that those who possessed this species of property were accustomed in disposing of it by will to set apart a portion of the income for the purpose of a renewal fund. [His Lordship then stated the facts of the case, and continued:—]

Addressing myself in the first instance to the case as if there had been no hearing on further consideration, the first question is, what is the position of a person having a life interest in a lease believed to be perpetually renewable, but which afterwards ceases to be so? I am of opinion that the interests of the tenants for life are not to be abridged by the taking away of the power of renewal. I am further of opinion that the persons interested during the life of the widow are entitled to the enjoyment of the

(1) Law Rep. 10 Eq. 572. (2) 27 Beav. 625.

property in specie, and that on her death, if that event should happen before the expiration of the lease, whatever interest may be then left will belong to those in remainder.

Then comes a question also of great importance; it is whether, inasmuch as if another renewal had taken place the fund now accumulated would have been applied in paying the fine, the persons interested during the life of the widow are bound to submit to have their interests diminished by the sum set apart for renewal. If there had been no decisions, my opinion would have been that the justice of the case would be met by putting the parties in the same position as if the renewals had gone on. Assuming, for instance, that, after providing a fund for renewal, there was an available balance of income of £250, that sum would be paid to the persons interested during the life of the widow, and the rest appropriated to the renewal fund. But the question is concluded by the decision of Lord *Eldon*, pronounced in the year 1813, in *Tardiff* v. *Robinson* (1), where there were leaseholds believed to be renewable, and held upon trusts to renew, and to apply the proceeds, after providing for the renewal fund, in a particular way, and he held that when the leases had ceased to be renewable a person interested for life only was entitled to receive the rents free from any deduction for the purpose of creating a renewal fund. That case was followed by Lord *Romilly* in *Morres* v. *Hodges* (2), and all the authorities are the same way except *In re Wood's Estate* (3), and therefore I should be bound by those authorities, however strong my own opinion might be. I am therefore bound to decide that there is no right to impound any part of the income, but that the whole ought to be paid over.

Against these authorities the only case cited is *In re Wood's Estate*, as to which I can only say that I do not concur with all the Vice-Chancellor appears to have said in that case. I think he took an erroneous view in saying that it was a case of one perpetuity substituted for another, and that there was a departure from the rule acted on in *In re Money's Trust* (4), that when a railway company takes possession of land in which there is a person

(1) 27 Beav. 629, n.
(2) Ibid. 625.
(3) Law Rep. 10 Eq. 572.
(4) 2 Dr. & Sm. 94.

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interested for life, or having a leasehold interest, the Court will put the tenant for life as far as possible in the same position as he was before, or, in other words, give him the income of the fund when invested, with sufficient dipping into the capital to make up for the diminution in the interest arising from the change of investment. I am unable to concur in that decision, which seems to be directly opposed to *Morres* v. *Hodges* (1), though the Vice-Chancellor does not profess to overrule it, or the decisions on which it was founded, or say that he would not follow *Morres* v. *Hodges* in a similar case.

Now the broad point in the present case was decided in *Morres* v. *Hodges*, and the Master of the Rolls says in his judgment, "I think I am bound by the decision of Lord *Eldon* in *Tardiff* v. *Robinson* (2) that the fund belongs to the tenant for life."

In text books the subject is treated as having been settled in this way. Above all, *Hayward* v. *Pile* (3) expressly decided that the Court would not compel the purchase of a reversion at the expense of a tenant for life without his consent.

I am therefore completely bound by these decisions to say that the parties entitled to the rent-charge are entitled to it without any deduction for the purpose of making a renewal fund. But what surprises me is, that this application is made in the face of the order of the Vice-Chancellor *Kindersley* on further consideration, directing that after 1859 the trustees shall divide the whole surplus of the rent-charge without any deduction in respect of renewals. Therefore here is an express direction, and in violation of that order the trustees have set aside a fund to renew what is incapable of being renewed. I am of opinion that the Petitioner has been wrong in principle from beginning to end, and the petition must be dismissed; and although I should be glad if he could be relieved from paying the costs, as that view is not acquiesced in the dismissal must be with costs.

C. A. The Petitioner appealed from this decision, and the appeal came on to be heard on the 1st of June, 1876.

(1) 27 Beav. 625. (2) 27 Beav. 629, n.
(3) Law Rep. 5 Ch. 214.

Hastings, Q.C., and *Langworthy*, for the Appellant:—

We submit that the principle of the cases is this: If there is discovered in a will a paramount trust for renewal, then, whatever accident may happen, the property cannot be so dealt with as to benefit the tenant for life at the expense of the remainderman—though the case may be otherwise where the testator contemplated the possibility of non-renewal: *In re Wood's Estate* (1); *Hollier* v. *Burne* (2); *In re Money's Trust* (3); *Hayward* v. *Pile* (4). In *Tardiff* v. *Robinson* (5) there was not a paramount intention to renew; nor in *Morres* v. *Hodges* (6). The property being now a wasting property ought to be sold, and the proceeds and the accumulation fund treated as capital. Then as to the order on further consideration, we contend, first, that it is wrong on the face of it, and the Court can disregard it. Secondly, that as it directs a certain payment until further order, the Court can deal with the matter now on the merits. Thirdly, that the order does not affect the glebe land, and so cannot, at all events, affect the Appellant's title to relief as to that. If, however, the Court considers that order to be in our way, leave can now be given to appeal against it notwithstanding the lapse of time: *Brandon* v. *Brandon* (7); and we ask for such leave.

[It was ultimately arranged that to avoid the necessity of an appeal being presented, the case should be treated irrespective of the order on further consideration.]

This being a petition by a trustee, the Court, even if opposed to his claim as regards the beneficial interest, ought to have distributed the fund, and not merely dismissed the petition.

Glasse, Q.C., and *F. Vaughan Hawkins*, for the Respondent:—

We contend that the Vice-Chancellor was right in holding that as renewal is impossible the fund belongs to the tenant for life: *Colegrave* v. *Manby* (8); *Richardson* v. *Moore* (9); *Tardiff* v. *Robinson*, in which the trust was imperative. The report of

(1) Law Rep. 10 Eq. 572.
(2) Ibid. 16 Eq. 163.
(3) 2 Dr. & Sm. 94.
(4) Law Rep. 5 Ch. 214.
(5) 27 Beav. 629, n.
(6) Ibid. 625.
(7) 7 D. M. & G. 365.
(8) 6 Madd. 72; 2 Russ. 238.
(9) Cited 6 Madd. 83, n.

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In re Money's Trust in the Law Journal (1) shews that the lease there was renewable. The authorities are summed up in our favour in *Lewin* on Trusts (2). *In re Wood's Trusts* (3) and *Hollier* v. *Burne* (4) do not agree with the current of prior authorities. The trustees ought not to exercise the power of renewal unless it is beneficial, and so as not to alter the rights of the successive takers: *Milsington* v. *Mulgrave* (5); *Mortimer* v. *Watts* (6); *Lord* v. *Godfrey* (7). The income is not here given to the tenant for life with the exception of a yearly sum for renewal, but subject to a yearly charge for that purpose, and the renewal having become impossible the charge sinks into the estate: *Re Cooper's Trusts* (8); *Tucker* v. *Kayess* (9); *Fisk* v. *Attorney-General* (10). There is no trust for sale, only a power, and the power of sale ought not to be exercised unless the circumstances are such that an absolute owner would think it advisable to sell. *Tardiff* v. *Robinson* (11) is recognised in *Colegrave* v. *Manby* (12), and in *Bennett* v. *Colley* (13).

Hastings, in reply.

Judgment, C. A. Baggallay, J.A.

July 11. BAGGALLAY, J.A.:—

The question involved in this appeal is as to the respective rights of persons entitled under the will of the Rev. *John Maddy* to estates for life and in remainder in certain leaseholds held under the Dean and Chapter of *Ely*, which were renewable at the respective dates of the testator's will and of his decease, but which can no longer be renewed by reason of the reversion having become vested in the Ecclesiastical Commissioners.

The testator, *John Maddy*, by his will, dated the 16th of June, 1851, gave to his executors his share of the great tithes, or commutation rent-charge in lieu of tithes, arising out of the parishes

(1) 31 L. J. (Ch.) 496.
(2) 4th Ed. p. 276.
(3) Law Rep. 10 Eq. 572.
(4) Ibid. 16 Eq. 163.
(5) 3 Madd. 491.
(6) 14 Beav. 616.
(7) 4 Madd. 455.
(8) 4 D. M. & G. 757.
(9) 4 K. & J. 339.
(10) Law Rep. 4 Eq. 521.
(11) 27 Beav. 629, n.
(12) 6 Madd. 72; 2 Russ. 238.
(13) 2 My. & K. 225.

17 Jan 1883.

of *Holy Trinity* and *St. Mary*, in *Ely*, to which he expressed himself to be entitled under a lease from the Dean and Chapter of *Ely*, upon trust to renew the lease from time to time out of the proceeds of the said tithes, and to divide the surplus annually during the life of his wife equally between her and four of his grandchildren, and he directed that, after the decease of his said wife, the said tithes should become part of his residuary estate; he further empowered his executors, at any time after his decease, if they saw fit, to sell the said tithes or rent-charge, and to invest the proceeds in consols; and he gave all his residuary estate in trust for his aforesaid four grandchildren and two other grandchildren, viz., the present Petitioner, Mr. *Hewett*, and the Defendant *Emily Burlton*. At the time of his decease the testator was equitably entitled to one equal tenth part of the rectory of *Holy Trinity* and *St Mary the Virgin*, and of certain glebe lands and tithes of the said rectory, the entirety whereof were vested in trustees for the remainder of a term of twenty-one years from the 29th of September, 1838, upon certain trusts for obtaining the renewal of the lease from time to time, and for raising out of the rents and profits of the property leased, or by mortgage thereof, the necessary fines for renewal; and, subject thereto, upon trust for certain persons in certain shares, being, as to one-tenth part thereof, in trust for the testator, *John Maddy*. In the year 1859, and again in 1866, the trustees renewed the lease; and, on the latter occasion, the renewal was effected by two leases, one of the tithes and the other of the glebe lands, each being for a term of twenty-one years from the 29th of September, 1866. One equal tenth part of the fines and expenses required for the renewals of 1859 and 1866 was contributed by deductions from the income of testator's share.

Since the renewal of 1866 the trustees of the will of the testator have raised and accumulated out of the profits of the testator's share a fund for renewal of the leases of that date, and such fund now amounts to £1003 6*s.* 7*d.* Consolidated Bank Annuities; but the reversion of the said leases having become vested in the Ecclesiastical Commissioners, it is now impossible to procure any further renewal, and the leases will expire in 1887.

A state of circumstances has thus arisen in which it is im-

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possible to literally comply with the directions contained in the testator's will; and the actual question for decision is, in what way should the leaseholds and the accumulated fund be respectively dealt with? The Vice-Chancellor was of opinion that the tenants for life were entitled to enjoy the leaseholds in specie, and were also entitled to the whole of the renewal fund, and he dismissed with costs the petition of Mr. *Hewett*, which prayed in effect for a sale of the leaseholds, and that the produce of such sale and the renewal fund should be treated as corpus, and dealt with accordingly under the trusts of the will.

From that decision the present appeal is brought.

It should be mentioned that, upon the hearing of the cause on further consideration on the 20th of April, 1857, an order was made directing the trustees to retain out of income, and invest annually until the year 1859, such a sum as would be sufficient to provide a fund for the renewal of the leases, and to pay the surplus of the income to the tenants for life, and also to pay to them the surplus of the accumulated fund, if such fund should be more than sufficient for such renewal; and it was by the said order further directed that, after the year 1859, the trustees should, during the life of the testator's widow, divide the whole of the surplus of the tithe rent-charge beween the tenants for life without making any deduction for renewal.

The substantial question raised by the present appeal would appear to be materially affected, if not substantially decided, by the order so made on further consideration, and from which there was no appeal; but, leave having been asked by the present Appellants to appeal against that order, notwithstanding the lapse of time, it has been agreed that the whole matter shall now be disposed of, as if the order on further consideration was now under appeal.

Now in this case, as in all other cases of the same description, it is the duty of the Court to ascertain what was the paramount object of the testator in the dispositions made by him; were such dispositions, so far as they provided for renewal, simply of a permissive or discretionary character, or did he intend that, upon the death of the tenant for life, the remainderman should succeed to the enjoyment, as nearly as might be, of the corpus of the same

property as that to the income of which the tenant for life was entitled.

This was the test applied, and I think correctly applied, by Lord Justice *James*, when Vice-Chancellor, in *In re Wood's Estate* (1). In that case the testator directed that a portion of the rental to be derived from his leasehold property, held under the Dean and Chapter of *Westminster*, should be set apart as a renewal fund, so that the estates might be always kept renewed, and then devised it upon trusts which were in effect for his wife for life, and after her decease for his children. The property was held under two leases, which by practice and usage were renewable every fourteen years; one was renewed in 1856 and the other in 1864, so that the usual times for renewal would have been for the one in 1870, and for the other in 1878. In 1865 and 1866 a railway company, acting under parliamentary powers, gave notices to purchase certain parts of the leaseholds; and as the purchase-moneys, when invested in consols, produced a diminished income, the question was, whether the tenant for life was entitled to be recouped the deficiency out of the corpus of the fund. The Vice-Chancellor was of opinion that the paramount object of the testator was to have the estate renewed for the equal benefit of all the persons entitled in succession, and held that the tenant for life was only entitled to the income produced by the investment of the purchase-moneys.

It may be noted that in the case of *In re Wood's Estate* the notices were served by the railway company before the right to the reversion had passed to the Ecclesiastical Commissioners, and the leaseholds were consequently converted into consols through the act of the Legislature. It thus illustrated, in the simplest manner, the principle upon which a Court of Equity would act, when dealing with successive interests in leaseholds, which have been forcibly converted into the equivalent of a fee simple estate, instead of being perpetually renewed in the manner directed by the testator.

The same principle was acted upon by Lord *Selborne* in *Hollier* v. *Burne* (2); in that case the testator, after bequeathing leaseholds held under the Dean and Chapter of *Bristol* in trust for his

(1) Law Rep. 10 Eq. 572. (2) Law Rep. 16 Eq. 163.

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daughter for life, and after her death for her four children, authorized his trustees to set apart an annual sum for renewal, with directions that, if the annual sum so set apart was not sufficient for that purpose, the deficiency should be made up by the persons for the time being entitled to the income; the will also contained an absolute power for the trustees to sell the estate. The reversion became vested in the Ecclesiastical Commissioners, who declined to renew, but were willing to sell the reversion in part of the property in consideration of the surrender of the lease of the rest and the payment of a sum of money; and, upon the application of one of the parties entitled in the reversion, Lord *Selborne*, being of opinion that the trusts for renewal were paramount to the interest of the tenant for life, held that the proposed arrangement was within the powers conferred by the will and the statute 23 & 24 Vict. c. 124, and that the Court had power to carry it into effect, notwithstanding the opposition of the tenant for life, who opposed it on the ground that her income would be greatly diminished.

If, then, the same test is applied to the present case as was applied by the Lord Justice in *In re Wood's Estate* (1), and by Lord *Selborne* in *Hollier* v. *Burne* (2), and we proceed to inquire what was the paramount intention of the testator, as indicated by the dispositions made by his will, it appears to me impossible to arrive at any other conclusion than that he intended that those entitled in reversion expectant upon the decease of his wife should succeed to the enjoyment of substantially the same estate as that the income of which was to be enjoyed by those designated to take it during his wife's life. The circumstances of the present case would appear to be almost stronger in favour of this view than they were in either of the cases to which I have referred; the first trust declared by the will is that the trustees should from time to time renew, and raise the necessary funds out of income, and it is only in respect of the property, so from time to time renewed, at the cost of income, that the testator proceeds to declare trusts in favour of the beneficiaries, and this view of the case is strengthened by the fact that an absolute power of sale is conferred upon the trustees.

(1) Law Rep. 10 Eq. 572. (2) Law Rep. 16 Eq. 163.

The Vice-Chancellor appears to have been of opinion that the point raised upon this petition had been expressly decided by Lord *Eldon* in *Tardiff* v. *Robinson* (1), and that that decision had been followed by Vice-Chancellor *Kindersley* in *In re Money's Trust* (2), and by Lord *Romilly* in *Morres* v. *Hodges* (3), and that the only case in which it had not been followed was that decided by the Lord Justice, to which reference has already been made, *In re Wood's Estate* (4). Now, in *Tardiff* v. *Robinson* certain Crown leaseholds were settled by deed (not by will) upon trust for the Countess *Tardiff* for life, with remainder as she should appoint, and with a proviso that it should be lawful for the trustees, at the usual and ascertained times, and at the request of the Countess during her coverture, and afterwards at their own discretion, to renew the lease, and to raise the fines out of the rents or by mortgage; and the Countess, by her will, appointed the funds, subject to the payment of certain sums, to her husband for life, with limitations over. It will be observed that the trusts or directions for renewal were in the deed only, though a further fund was provided by the will for payment of the fines.

In such a case it appears to me that it would have been impossible to hold that there was any overriding trust for renewal. Not only was the question whether there should be a renewal or not left after the death of the Countess to the discretion of the trustees, and it was not until after her death that the question arose; but they were in any event bound by the strict terms of their trust, which conferred upon them the power of raising money to renew at the usual and accustomed times, and at those times only; and the Crown having absolutely refused to renew, such times could never arrive. Lord *Eldon* accordingly declared that as no renewal could be obtained, no accumulation of the rents and profits could take place. It is immaterial to consider whether, if the trusts in that case had been created by will instead of by deed, a different conclusion might not have been arrived at. The decision in *Richardson* v. *Moore* (5), which had reference to the same property, depended upon the provisions of an earlier deed of

(1) 27 Beav. 629, n.
(2) 2 Dr. & Sm. 94.
(3) 27 Beav. 625.
(4) Law Rep. 10 Eq. 572.
(5) Cited in 6 Madd. 83, n.

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settlement, but such provisions did not substantially differ from those which had to be considered in *Tardiff* v. *Robinson* (1).

As regards *In re Money's Trust* (2), it does not appear from the reports whether the will contained any trusts or directions for renewal, and the Vice-Chancellor *Kindersley* appears to have decided the case on the authority of Lord *Romilly's* decision in *Morres* v. *Hodges* (3), in which case Lord *Romilly* considered himself bound by Lord *Eldon's* decision in *Tardiff* v. *Robinson*. It is also to be noted, that in *Morres* v. *Hodges* the question arose upon a deed, and that there was no express trust to renew, but only a direction to the trustees to use their best endeavours to renew.

Hayward v. *Pile* (4) was also cited by the Respondents; but in that case, also, there was no absolute trust for renewal; the trusts were that the trustees should, if they thought fit, but not otherwise, at the usual times and periods, or at such other times or periods as they should deem expedient, procure a renewal of the leases, and should for that purpose raise money as therein mentioned.

Upon a full consideration of all these cases I have come to the conclusion that the cases of *Richardson* v. *Moore* (5), *Tardiff* v. *Robinson*, *Morres* v. *Hodges*, and *Hayward* v. *Pile* are distinguishable from those of *In re Wood's Estate* (6), *Hollier* v. *Burne* (7), and that now under consideration; in no one of the former was there, whilst in each of the latter there was, a predominant trust for renewal overriding the dispositions in favour of the successive beneficiaries.

The intention of the testator being thus ascertained, the question remains, How can that intention be best effectuated?

The decisions in *In re Wood's Estate* and *Hollier* v. *Burne* would indicate that the strictly correct course to have followed would have been for the trustees to have exercised their power of sale over the leaseholds as soon as it was ascertained that the leaseholds could not be again renewed, a period corresponding in the present case with that of the last renewal, viz., in 1866; and, had

(1) 27 Beav. 629, n.
(2) 2 Dr. & Sm. 94.
(3) 27 Beav. 625.
(4) Law Rep. 5 Ch. 214.
(5) Cited in 6 Madd. 83, n.
(6) Law Rep. 10 Eq. 572.
(7) Law Rep. 16 Eq. 163.

the power been so exercised, the beneficiaries during the life of the widow would have been entitled to the income arising from the investment of the amount so produced.

This course, however, was not followed; but a certain sum has been annually retained by the trustees, equivalent, as I understand, to the amount which would have been properly retained for the purpose of renewal, had renewal been still possible. If the amount so retained was accurately ascertained, and there appears to be no reason to doubt that such was the case, the aggregate of the produce of a sale now to be effected, and of the accumulations until sale, would substantially represent the value of the leaseholds at the time when they ceased to be renewable.

The result is, that the order of the Vice-Chancellor should be discharged, and an order should be made in accordance with the prayer of Mr. *Hewett's* petition.

The order should contain a recital to the effect that the order on further consideration was by consent treated as under appeal.

The costs of all parties should be paid out of the fund.

LUSH, J., concurred.

JAMES, L.J.:—

I have reconsidered the case of *In re Wood's Estate* (1), with the observations of the Vice-Chancellor upon it, and have had an opportunity of reading the judgment now delivered, which is in my opinion correct.

Solicitors: *White, Renard, & Co.; Shoubridge; Berkeley; John Murray; J. E. Fox & Co.*, agents for *Turner & Poole, Taunton.*

(1) Law Rep. 10 Eq. 572.

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C. A.
July 7, 14.

POCOCK *v.* ATTORNEY-GENERAL.

[1875 P. 110.]

Will—Charitable Gift—Fund to be distributed at the Discretion of Executors.

A testator directed that a fund of personalty over which he had a general power of appointment should, unless otherwise specifically disposed of by a codicil, become part of his residuary estate. By a codicil he gave out of this fund various charitable legacies, and directed that the residue of the fund should be given by his executors to the charitable institutions to which he should by any future codicil give the same, "and in default of any such gift, then to be distributed by my executors at their discretion." He made no subsequent codicil:—

Held (affirming the decision of *Hall*, V.C.), that the ultimate trust in the codicil was that the residue should be distributed by the executors among charitable institutions at their discretion, and that a trust in favour of charity was created.

Statement.

J. J. POCOCK, having a general testamentary power of disposition, subject to a prior life interest in his wife, over certain insurance and other moneys and funds subject to the trusts of his marriage settlement, by will in November, 1861, made sundry devises and bequests, and confirmed the settlement, and after directing that the sum of £5000 Reduced £3 per Cent. Annuities should, at the death of his wife, be transferred to his nephew (the Plaintiff), proceeded as follows:—

"And as to all the insurance and other moneys, stocks, funds, or securities, subject to the trusts of my said settlement over which I have any power of disposition, I direct that the same, unless otherwise specifically disposed of by a codicil to this my will, shall sink into and become part of my residuary estate hereinafter disposed of, and I appoint, give, and bequeath the same accordingly."

The testator then, subject as aforesaid, gave all his real and personal estate to the Plaintiff and two others, their heirs, executors, &c., upon trusts for conversion and investment of the residue after satisfying all his debts, funeral and testamentary expenses, and the legacies bequeathed by his will, and any codicil thereto;

and he declared that the trustees of all the aforesaid residuary estates and trust premises should stand seised and possessed thereof upon trust out of the income of the investments to pay certain annuities, and subject thereto to pay the income to his wife for life, and after her decease upon trust to stand possessed of the capital of the same residuary estate and premises, and the annual income thereof, upon and for such trusts as he "should by any codicil to that his will direct or appoint."

By a codicil in December, 1861, the testator made the following dispositions:—

"Out of the insurance and other moneys, stocks, funds, or securities subject to the trusts of my marriage settlement, and over which I have any power of disposition at the death of my wife, I give to the respective treasurers or trustees for the time being of the following societies and institutions respectively, and in aid of the funds of the same, out of such part of the said insurance and other moneys or securities as may be lawfully devoted to charitable purposes, the following sums or legacies, clear of legacy duty, that is to say, to the treasurer or trustees for the time being of *King's College Hospital*, £400; the *Society for Promoting Christian Knowledge*, £400; the *Society for the Propagation of the Gospel in Foreign Parts*, £400; and the *Society for the Education of the Poor in the Principles of the Church of England*, £400; in addition to the sums of £100 given by my will to each of the said societies and institutions; also to the *Society for Convalescent Poor at Seaford*, in the county of *Sussex*, the sum of £100; and as to the residue of the said insurance and other moneys, stocks, funds, and securities, I direct the same to be given by my executors to such charitable institutions as I shall by any future codicil give the same, and in default of any such gift then to be distributed by my executors at their discretion."

The testator then proceeded: "And as to my general residuary trust estate, effects, and premises, I give, direct, and appoint the same, after the death of my said wife, to the persons and in the manner following." He then gave various legacies, and the residue to the Plaintiff.

The testator made no further codicil. His widow survived him,

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and died in 1875. On her death the questions arose whether the residue of the funds in the marriage settlement was effectually given to charity, and if not, whether it went to the residuary legatee or to the testator's next of kin. A special case was agreed upon for the opinion of the Court, and came on to be heard before Vice-Chancellor *Hall* on the 13th of March, 1876.

Dickinson, Q.C., and *Bond*, for the Plaintiff.

Rigby, for the Attorney-General.

A. Thomson, for the next of kin.

R. O. Turner, for the other executor.

Judgment, V.-C. H.

HALL, V.C.:—

This case has been extremely well argued on all sides, and a question of some nicety and difficulty has presented itself.

The scheme of the will is this:—[His Lordship read the material parts of the will.]

Under that will the insurance moneys were included in the residuary gift to the three persons named, who were also executors, and they would take the insurance moneys in their character of executors in the first instance, and in the next instance in their character of residuary legatees in trust, subject only to such specific dispositions as might be made of them by the testator by any codicil which he might make to his will. The legal title therefore, unquestionably, to those policy moneys would be in those persons, the executors and trustees.

He then made a codicil, and in that codicil he takes up the imperfect disposition of the insurance moneys, and out of those insurance moneys he gives to the respective treasurers or trustees for the time being of certain specific societies and institutions certain sums of money. Then he says: "And as to the residue of the said insurance and other moneys, stocks, funds, and securities, I direct the same to be given by my executors to such charitable institutions as I shall by any future codicil give the same, and in default of any such gift, then to be distributed by my executors at their discretion."

The disposition made by the testator's will of his general estate

was very incomplete, his general estate being only disposed of to the extent of providing for debts, legacies, and annuities, and giving his wife a life interest in the residue, and subject to that he contemplated its being disposed of by a codicil. In this codicil he gives out of the general residue, after the death of his wife, certain legacies, and gives the residue, after payment of those legacies, to the nephew, who is also one of the residuary legatees in the codicil, We must therefore, first of all, as regards the residuary general estate, read the will and codicil together, by reading the will as containing this disposition of the residue in the place of that portion of the will which directs the trustees to stand possessed of the corpus after the death of the wife upon such trusts as he should by any codicil direct. I insert, therefore, into the will, after the gift of the life interest to the wife, this disposition, which is contained in the codicil, of the general residue, and that makes a perfect disposition of the general estate.

Having so completed the disposition of the general estate by means of the codicil, I must read the will with reference to the insurance moneys, having regard to its disposition of the general residue, as completed by means of the codicil. Then the disposition of the insurance moneys amounts to this, that by force of the will and codicil taken together, they are given to the nephew, except so far as they are specifically bequeathed, because the general estate is given to him, and the insurance moneys are directed to go along with the residue, except in so far as they are specifically bequeathed.

The effect of that is to displace the contention which has been put forward on behalf of Mr. *Thomson's* clients. I find by force of the two documents taken together a complete disposition, except in so far as the property is specifically bequeathed by any codicil to the testator's will.

But that being so, the great and grave question in this case is, whether there is or is not a gift by the codicil of the insurance moneys in favour of charity. Now the argument in favour of charity I conceive to be twofold. One argument is that the property is given to charity because the codicil directs it to be given by the executors to such charitable institutions as the testator should by a future codicil give the same, "and in default of any

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such gift, then to be distributed by my executors at their discretion," which disposition, it is said, upon a fair construction of the whole sentence, is a disposition in favour of charity altogether. Then it is said that, independently of the mere construction of those particular parts of the codicil, the latter part of that clause is in fact a power in the nature of a trust, which trust was a trust created in favour of charity.

It appears to me that the first contention is enough to dispose of this case, that upon a just and fair construction of this clause there is in this clause a direction that the property shall go to charity, whether it goes through the medium of a codicil giving it to charity, or whether it goes through the medium of a distribution of the fund made by the executors. I consider that upon a fair construction the disposition amounts to this: "I direct my executors to pay this over to such charitable institutions" (so far the direction goes) "as I shall by any future codicil give the same, and in default of any such gift" (the word "gift" there having reference to the word "give" immediately preceding it), "then to be distributed by my executors at their discretion in pursuance of my direction," which is a direction that "the same shall be given by my executors to such charitable institutions, either as I shall specify by a codicil, or in default thereof, as my executors at their discretion shall distribute it among." I think, upon a fair construction of that sentence, the distribution of the fund is to be in favour of charitable institutions.

If that is the fair, proper, and sound construction of that part of the will, it disposes of the case quite irrespective of any of the authorities which have been referred to, and I think that it is. The sentence begins with a direction, which direction covers the whole of the sentence, not merely that part of it which supposes he may make a codicil, but also the latter part of the direction as to the distribution by the executors at their discretion. He says in effect: "It is to be done at your discretion if I do not do it myself. I may do it myself by a codicil, and my direction is that it shall be given by my executors to such charitable institutions as they shall in their discretion choose to distribute it amongst, unless I myself point out the charitable institutions who are to take the fund."

Then, upon the other ground, it seems to me that upon a fair construction this is a direction amounting to a trust, and a trust to be executed in favour of charity. The testator had contemplated himself selecting the charities by a further codicil. If he had stopped there, there is no doubt that there would have been a trust in favour of charity. That is clear upon the authorities, one of which has been referred to by Mr. *Rigby*, namely, *Mills* v. *Farmer* (1). But it is said that that is not so because there is a gift over to somebody else, or something which prevents the application of that rule. It does not appear to me that the case is analogous to the case of a power of distribution, or a power of appointment in favour of a class with a gift in default of appointment, not to the class, but to another person. That is a case where you cannot imply a gift from the power itself. You cannot do that, because it is provided that if the power is not exercised the property shall go somewhere else. In that case, therefore, nothing can be implied, but here, there being a power in favour of charity with a direction for distribution in default of particular charities being specified, not saying that they may distribute it among such persons as they may choose to select—but it is to be a distribution, and, as I conceive, a distribution with reference to the obvious and clearly manifest intent to be derived from the earlier part, viz., a distribution for charitable purposes, which are left undefined and incomplete merely by reason of the testator not having made a codicil. It appears to me that the legal title being in the executors, as well by reason of their being executors as by reason of the gift in the will (subject to any special disposition), they taking the legal title, there is really no difficulty whatever by reason of there being contained in this instrument that which has been described as being an actual disposition of the beneficial interest.

In most, if not all, of the cases where a power though not exercised has been held to confer a beneficial interest on its objects, it is true that the property has been given to certain persons, sometimes to a person who upon a true construction of the will is only to take beneficially for life, and then there follows a provision about distribution in the form of a power. In those cases, although

(1) 1 Mer. 55.

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the whole interest has been given to the person who upon construction takes beneficially for life only, there has been in reality no disposition whatever of the beneficial interest until you come to the power itself, and therefore there is no other disposition of the beneficial interest except through the medium of the power; and I observe with reference to that, in a case which was referred to where these cases were very much examined, namely, the case of *Burrough* v. *Philcox* (1), that Lord *Cottenham* examines the cases and comments on the *Duke of Marlborough* v. *Lord Godolphin* (2) in terms which do not add much to its authority. It does not seem to have commended itself to the judgment of the Lord Chancellor, but he refers to more than one case in which there was really no disposition except in the form of a power. *Witts* v. *Boddington* (3) seems to be a case of that kind. There the gift was only to the wife for life, with power, by her will or otherwise, to give the sum amongst the children. The children were held to take in default of appointment by the wife, although there was nothing excepting the life interest given to the wife. There are other cases referred to, but in fact *Burrough* v. *Philcox* itself seems to be a case of that kind. I do not see any substance, therefore, in the ingenious argument which Mr. *Dickinson* has addressed to me for the purpose of distinguishing this case from *Brown* v. *Higgs* (4), and that class of cases; and it does seem to me that it is impossible to read this direction at the end of the codicil—a direction which applies as well to the direction to pay over the fund to such charities as shall be nominated by a codicil as to the other part, viz., to a distribution by the executors themselves—it is impossible, I think, to read this codicil without seeing that it is a plain direction amounting to a trust in the form of a power or a direction. I should rather treat it as a direction than as a power, or it may be either or both. There is a clear direction, it appears to me, that the executors shall distribute this; and following, as it does, a clear gift in favour of charity and charitable institutions, it appears to me plain on the face of the codicil that there was a duty upon the executors to distribute this fund among charitable institutions in the event, which happened, of the testator

(1) 5 My. & Cr. 73.
(2) 2 Ves. Sen. 61.
(3) 3 Bro. C. C. 95.
(4) 5 Ves. 495.

failing to make any distribution or disposition of it by any further codicil.

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It seems to me, therefore, that upon the whole there must be a scheme settled for the purpose of disposing of this charitable gift.

The Plaintiff appealed, and the appeal came on to be heard on the 5th of July, 1876.

C. A.

Dickinson, Q.C., and *Bond*, for the Appellant:—

Argument.

The testator refers to a codicil to be made, and none was made; in default of it he directs that the funds shall be distributed by his executors at their discretion. This cannot be construed to be a gift to them to be disposed of in charity: *Buckle* v. *Bristow* (1); *Aston* v. *Wood* (2). It is, then, a gift which fails for vagueness: *Morice* v. *Bishop of Durham* (3); *James* v. *Allen* (4); *Vezey* v. *Jamson* (5); *Ommanney* v. *Butcher* (6); *Fowler* v. *Garlike* (7); *Ellis* v. *Selby* (8); *Harris* v. *Du Pasquier* (before Vice-Chancellor *Wickens*, May 27, 1872); *Yeap Cheah Neo* v. *Ong Cheng Neo* (9).

[JAMES, L.J., referred to *Gibbs* v. *Rumsey* (10).]

That decision was disapproved of in *Ellis* v. *Selby* and *Buckle* v. *Bristow*. To hold this a charitable gift would be importing words into the will.

Rigby, for the Attorney-General:—

The Court will not construe a single clause strictly where doing so would defeat the intention shewn on the whole will. *Dolan* v. *M'Dermott* (11) is an instance of this as regards charities. It is shewn by *Mills* v. *Farmer* (12) and *Moggridge* v. *Thackwell* (13) that if the testator had stopped short with the direction to pay to such charitable institutions as he should by a future codicil appoint, and had made no future codicil, the property would have been effectually devoted to charity. This being clear, the Court will not undo it unless there is something clear the other way. On a

(1) 10 Jur. (N.S.) 1095.
(2) Law Rep. 6 Eq. 419.
(3) 9 Ves. 399; 10 Ves. 522.
(4) 3 Mer. 17.
(5) 1 S. & S. 69.
(6) T. & R. 260.
(7) 1 Russ. & My. 232.
(8) 1 My. & Cr. 286.
(9) Law Rep. 6 P. C. 381.
(10) 2 V. & B. 294.
(11) Law Rep. 3 Ch. 676.
(12) 1 Mer. 55.
(13) 7 Ves. 36.

C. A. 1876 — POCOCK v. ATTORNEY-GENERAL.

fair construction, the vague direction at the end of the codicil means that the executors are to give to such charities as they shall think fit; it contains no express reference to persons, and it is inconceivable that the testator departed from his charitable intentions in the middle of a sentence.

[He was here stopped by the Court.]

Bond, in reply.

Judgment, C. A. James, L.J.

JAMES, L.J.:—

I am of opinion that the decision of the Vice-Chancellor must be affirmed. If this will had come before the Court for the first time, and the Court, unfettered by decision and unfettered by rules of construction, had to consider, without reference to consequences, what the intention of the testator was in using the words, "I direct the same to be given by my executors to such charitable institutions as I shall by any future codicil give the same, and in default of any such gift then to be distributed by my executors at their discretion," the Court would have held the plain reasonable construction of the clause to be that the testator meant the discretion of his executors to be a substitute for his own in choosing the charities. The introduction of the words "charitable institutions" could have no effect on a future codicil, and the testator, therefore, had no object in mentioning them, except that of shewing that charity was his object, and shewing his meaning to be that if he did not name the charities his executors were to do so. The fair construction is, that the gift is to charitable institutions to be chosen by himself, and in default of such choice, then by his executors. And then if we look at *Mills* v. *Farmer* (1) and *Moggridge* v. *Thackwell* (2), we find that a gift to such charitable institutions as the testator shall by codicil appoint, is, without more, a clear gift to charity, though no codicil is made. When a clear gift is thus made, clear words are needed to take it away, and it cannot be taken away by mere words of distribution by the executors.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors: *Chapman, Turner, & Prichard; Currey & Holland; Raven & Hare.*

(1) 1 Mer. 55. (2) 7 Ves. 36.

Distinguished. MINISTRY OF HEALTH *v.* SIMPSON. [1950] 2 All E.R. 1137.

ROGERS *v.* INGHAM.

[1875 R. 57.]

C. A.
1876
V.-C. H.
Jan. 13.
C. A.
July 18.

Mistake of Law—Payment—Assent—Repayment.

The Court will not in all cases relieve against a payment of money under mistake of law.

An executor, acting on the advice of counsel on the construction of a will, proposed to divide in certain proportions a fund between two legatees. One of the legatees being dissatisfied took the opinion of counsel, which agreed with the former opinion. The executor then divided and paid over the fund in accordance with the opinions. Two years afterwards the dissatisfied legatee filed a bill against the executor and the other legatee, alleging that the will had been wrongly construed, and claiming repayment from the other legatee:—

Held (affirming the decision of *Hall*, V.C.), that the suit could not be maintained.

Davis v. *Morier* (1) distinguished.

6 Aff Cas 158-b

Statement.

JOHN INGHAM, by his will, bequeathed the residue of his estate to *W. Taylor* and *W. Ingham* upon trust to divide the same between his children and their children as therein mentioned. He died in 1847, and his will was proved by *W. Taylor* and *W. Ingham*. In 1866 *Mary Rogers*, one of the testator's children who had under the will an estate for life in one-fourth of the estate, died, leaving her surviving two children, *Martha Rogers* and *R. R. Rogers*, and also *Thomas Wheatley*, husband and administrator of *Hester Wheatley*, another child who had died in the lifetime of *Mary Rogers*. *W. Ingham*, who had survived *W. Taylor*, paid the interest in that one-fourth of the estate for some time equally between *Martha Rogers* and *R. R. Rogers*, being of opinion that the share of *Hester Wheatley* had gone to them as survivors, and after the death of *R. R. Rogers* he paid the interest to *Martha Rogers* as surviving. *W. Ingham* then died, and *J. W. Ingham* took out letters of administration to his estate. *J. W. Ingham* took the opinion of counsel on the will, and was advised that the share of *Hester Wheatley* did not survive, but had become vested in her and passed to her husband as administrator, and conse-

(1) 2 Coll. 303.

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quently that the interest had been paid to *Martha Rogers* in error. Her solicitors took the opinion of another counsel, and wrote to the solicitors of *J. W. Ingham* as follows:—

Statement.

"We have taken an opinion on this matter, and may as well state it confirms the opinion of your counsel, but whether our client will be satisfied or not with it we cannot say. It is certainly a very great disappointment to her, and will be very hard indeed should Mr. *Ingham* and Mr. *Wheatley* insist on making the deductions you propose. Surely Mr. *Wheatley* will not look for the whole of the arrears of interest being paid to him. You must admit it is a very hard case as far as Mrs. *Rogers* is concerned. Will you kindly see your clients and write us what they are inclined to do, and we will endeavour to bring the matter to a conclusion at the end of the week."

The solicitors of Mr. *Ingham* however made out an account of the whole estate, debiting *Martha Rogers* with interest as paid to her in mistake, making £274 16*s.* 7*d.* as due to her from the estate of *John Ingham*. Some more letters as to the accounts passed, and on the 2nd of July, 1873, a cheque for £274 16*s.* 7*d.* was sent for *Martha Rogers*, and the receipt was acknowledged by her solicitors. At the same time £454 15*s.* 3*d.* was paid to *Thomas Wheatley* as the share of *Hester Wheatley*, with the arrears of interest paid to *Martha Rogers* as by mistake.

On the 14th of June, 1875, *Martha Rogers* filed her bill against *J. W. Ingham* and *Thomas Wheatley*, stating the will of *W. Ingham*, and submitting that on the true construction of the will the share did not vest in *Hester Wheatley*, but passed to *R. R. Rogers* (to whom *Martha Rogers* was administratrix) and *Martha Rogers* as surviving, and praying that *Thomas Wheatley* might be ordered to repay the same with interest.

The suit came on for hearing before Vice Chancellor *Hall* on the 13th of January, 1876.

Argument.

Dickinson, Q.C., and *Eyre Thompson*, for the Plaintiff.

Hastings, Q.C., and *Hanson*, for *Wheatley*, took the objection that the whole matter had been concluded in 1873.

HALL, V.C.:— C. A.

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ROGERS v. INGHAM.

Judgment, V.-C. H.

It appears to me that the Plaintiff is not entitled to recall the money which was paid over to the Defendant *Wheatley* under the circumstances which are disclosed in his answer. [His Lordship then stated the facts of the case.] There being a family dispute between the parties as to the true construction of this will, in order no doubt to avoid litigation, the fund was divided in a given way. That having taken place on the 2nd of July, 1873, upon the 12th of August, 1875, two years afterwards, this bill is filed to raise the question of construction which had been the subject of discussion between the parties, and upon which two opinions had been taken, these two opinions agreeing as to the construction of the will.

There has up to this time been no judicial determination to the contrary, and I think that the Court should not, under the circumstances, put a judicial construction upon the will. It seems to me that the fund was divided as a matter of arrangement between the parties, and that having taken place more than two years before the bill was filed, I ought not to give the assistance of this Court for the purpose of recalling that fund from the Defendant, who received it upon the faith and footing of what took place on that occasion. This has been acquiesced in, and the executor has been permitted to distribute the fund accordingly, which fund, for aught I know, *Wheatley* may have spent, and may not be in a position to restore. Under these circumstances, it appears to me that the Plaintiff's case fails, and taking that view, it is not necessary for me to determine—nor do I determine —what is the true construction of the will.

The Plaintiff appealed, and the appeal came on to be heard on the 18th of July, 1876. C. A.

Dickinson, Q.C., and *Eyre Thompson*, for the Appellant:— Argument.

This was not in any way a compromise, but a clear mistake by a trustee, and as such must be rectified: *Bingham* v. *Bingham* (1); *Naylor* v. *Winch* (2). In *Clifton* v. *Cockburn* (3) there had been

(1) 1 Ves. Sen. 126. (2) 1 S. & S. 555.

(3) 3 My. & K. 76.

C. A. 1876 ROGERS v. INGHAM. Argument.

long acquiescence. It was a common mistake under the advice of counsel: *Cooper* v. *Phibbs* (1). Payment by my trustee is payment by me, and I ought to recover the money: *Davis* v. *Morier* (2). A Court of Equity can relieve against the consequences of a mistake of law; moreover this is hardly a pure question of law: *Stone* v. *Godfrey* (3); *Bullock* v. *Downes* (4); *In re Condon* (5).

Hastings, Q.C., and *Hanson*, for the Defendant *Wheatley*:—

This is in fact an action for money had and received, but no such action will lie on a mistake of law when all parties knew the facts: *Brisbane* v. *Dacres* (6); *Midland Great Western Railway Company of Ireland* v. *Johnson* (7); *Stewart* v. *Stewart* (8). This is not a suit to set aside a compromise; this Defendant is a stranger to the Plaintiff, and the only case made is that the Defendant has received from a third person money which the Plaintiff says ought to have been paid to her, but the money is not ear-marked, and cannot be followed in this way. This Defendant is not a trustee for the Plaintiff, and there is no case of conscience against him, and there is no more case in equity than at law. *Reg.* v. *Lords Commissioners of the Treasury* (9) was a much stronger case.

Dickinson, in reply.

Judgment, C. A. James L.J.

JAMES, L.J.:—

I am of opinion that the judgment of the Vice-Chancellor ought to be affirmed.

In arriving at that conclusion I entirely put aside anything that has been said about any supposed or conditional consideration connected with the matter. It really is to be looked at as between the two persons who alone are now in litigation before us, that is, the Plaintiff on the one part, and *Wheatley* on the

(1) Law Rep. 2 H. L. 149.
(2) 2 Coll. 303.
(3) 5 D. M. & G. 76.
(4) 9 H. L. C. 1.
(5) Law Rep. 9 Ch. 609.
(6) 5 Taunt. 143.
(7) 6 H. L. C. 798.
(8) 6 Cl. & F. 911.
(9) 16 Q. B. 357.

other part; and the greater portion of the argument seems to me to be disposed of by this consideration, that there really is no question of trust, trust estate or trust money, to be dealt with. When a trustee, by the direction or with the authority of his *cestui que trust*, pays money to a third person, no matter under what claim of right or under what circumstances, it is exactly the same as if the *cestui que trust* had received the money from the trustee, and had herself paid it to that person. It is simply a question of money paid by the lady, or by the lady's direction, out of money of hers which the trustee had in hand to a person who said that he had a claim to the money.

That being so, it is reduced, as it appears to me, to a mere action for money had and received, and it is the same as if *A.* through a third person had paid money to *B.*, thinking that *B.* was entitled to it, *B.* thinking also that he was entitled to it; there having been, as it is now said, a mistake of law which was common to both parties. No authority whatever has been cited to us in support of the proposition that an action for money had and received would lie against a person who has received money from another, with perfect knowledge of all the facts common to both, merely because it was said that the claim to the money was not well founded in point of law. Of course cases of that kind must have continually occurred, and yet no case has been produced in which a suit of this kind has succeeded. And really when it is treated as the common case of money paid to *B.* under a mistake, the law on the subject was exactly the same in the old Court of Chancery as in the old Courts of Common Law. There were no more equities affecting the conscience of the person receiving the money in the one Court than in the other Court, for the action for money had and received proceeded upon equitable considerations. Here the money has got into the hands of one person, and he received it honestly, with no mistake on his part, and no mistake on the part of the lady or of the trustee, the intermediate hand through whom the money passed and by whom it was actually paid.

I have no doubt that there are some cases which have been relied on, in which this Court has not adhered strictly to the rule that a mistake in law is not always incapable of being

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remedied in this Court; but relief has never been given in the case of a simple money demand by one person against another, there being between those two persons no fiduciary relation whatever, and no equity to supervene by reason of the conduct of either of the parties.

It is said that there have been two cases of that kind. In *Bingham* v. *Bingham* (1) a man was held to be entitled to get his money back when he had paid it for a conveyance of his own land from another person. It was held in that case that he was entitled to recover back the money because he had not the consideration for which he had bargained. The other case is *Davis* v. *Morier* (2), where the relation of trustee and *cestui que trust* existed between the parties; but when the facts of that case come to be looked into, the person who received the whole income of the fund on trust to apply the same properly, and who was the trustee, retained to himself all, except £500 a year, and it appeared that the £500 a year was not all that he ought to have paid to the *cestui que trust*, and that being so the Vice-Chancellor *Knight Bruce* directed an inquiry: first, as to whether he had retained more than he ought to have retained, and secondly, under what circumstances and whether the other *cestuis que trust* had in any manner assented to such retainer, that is to say, had acquiesced in it so as to shew whether they had given it up. Therefore there was there a question of a *cestui que trust* against a trustee, which trustee, no doubt under mistake, had retained trust money in his own possession.

That is the nearest case that I have been able to find to the case now before us, but that case is far from establishing the proposition contended for. If that proposition were true in respect of this case it must be true in respect to every case in the High Court of Justice where money has been paid under a mistake as to legal rights, and it would open a fearful amount of litigation and evil in the cases of distribution of estates, and it would be difficult to say what limit could be placed to this kind of claim, if it could be made after an executor or trustee had distributed the whole estate among the persons supposed to be entitled, every one of them having knowledge of all the facts.

(1) 1 Ves. Sen. 126. (2) 2 Coll. 303.

and having given a release. The thing has never been done, and it is not a thing which in my opinion is to be encouraged. Where people have a knowledge of all the facts, and take advice, and whether they get proper advice or not, the money is divided and the business is settled, it is not for the good of mankind that it should be re-opened by one of the parties saying: "You have received your money by mistake, I acquiesced in your receipt of it under that mistake, and, therefore, I ask you to give it to me back." I am of opinion, therefore, that the decision of the Vice-Chancellor is perfectly correct and ought to be affirmed.

Judgment, C. A. James, L.J.

MELLISH, L.J.:—

Mellish, L.J.

I am entirely of the same opinion. There is no doubt as to the rule of law that money paid with a full knowledge of all the facts, although it may be under a mistake of law on the part of both parties, cannot be recovered back; and I think it is equally clear that, as a general rule, the Court of Equity did not, in such cases, interfere with the Courts of Law. Nothing, in my opinion, would be more mischievous than for us to say that money paid, for instance, under a mercantile contract, according to the construction which the parties themselves put upon that contract, might, years afterwards, be recovered, because perhaps some Court of Justice, upon a similar contract, gave to it a different construction from that which the parties had put on it. I think there is no doubt that the rule at law is in itself an equitable and just rule which is not interfered with by Courts of Equity; but, on the other hand, I think that, no doubt, as was said by Lord Justice *Turner*, "This Court has power (as I feel no doubt that it has) to relieve against mistakes in law as well as against mistakes in fact" (1); that is to say, if there is any equitable ground which makes it, under the particular facts of the case, inequitable that the party who received the money should retain it.

Now, is there any such ground in this case? It appears that there was a trustee in possession of a fund which belonged either to the Plaintiff or to the Defendant. All the facts were perfectly well known; the trustee was in communication with both parties;

(1) *Stone* v. *Godfrey*, 5 D. M. & G. 90.

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both parties were well aware that the question was then to be decided; the Plaintiff's attention and the attention of the Plaintiff's legal advisers were called to all the facts and circumstances; she took advice upon the point, and she and her advisers being all of them aware that if she had not assented to the view that the trustee took, the natural consequence would be that the money would have been paid into Court under the *Trustee Relief Act*, and that she would have been obliged to have the question then decided. Therefore, having all the facts before her, and before her solicitors, and being advised, she thinks it better for her not to contest the matter, but to allow it to be settled in that way; and there is no doubt that she was advised properly. Thereupon the money was divided, and of course would not be paid into Court, and the matter would not be litigated. Then the question is, whether a person who has acted in this way is now entitled, because she has changed her mind, to litigate this question, which before she had been advised and had determined not to litigate. It seems to me that it would be contrary to the ordinary rule of law; and that the Defendant is entitled to say, "I received this money believing it to be my own; the person by whose direction it was paid was the counter-claimant against me; she knew all the facts, and elected at the time not to litigate the question, and therefore I have received the money just as if the question had been determined in open Court." In my opinion, it would be most unsafe to estates in general if we were to hold in a case of this kind that money paid under those circumstances could be got back; I agree, therefore, with the Lord Justice in thinking that the judgment of the Vice-Chancellor ought to be affirmed.

Baggallay, J.A.

BAGGALLAY, J.A.:—

I am of the same opinion, and I merely wish to add that while I give a general assent to the passage in the judgment of Lord *Brougham* (1), which has been referred to in the course of the argument, in which he expressed himself to the effect that cases might arise in which it would be the duty of the Court to relieve against an error of law, I do not think that the present is a proper case for the application of such a principle.

(1) 3 My. & K. 99.

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JAMES, L.J.:—

The appeal will be dismissed with costs.

Solicitor for Plaintiff: *F. Last,* agent for *Barrell & Rodway, Liverpool.*

Solicitors for Defendant: *Paterson, Snow, & Burney,* agents for *Dibb, Atkinson, & Braithwaite, Leeds.*

COX *v.* BARKER.

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[1876 B. 192.]

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June 17.
C. A.
July 19, 22.

Pleading — Demurrer — Multifariousness — Declaratory Decree—Specific Performance—15 & 16 *Vict. c.* 86, *s.* 50—*Rules of Court*, 1875—*Order* XVI., *rr.* 4, 13; *Order* XVII., *rr.* 1, 8, 9.

By a marriage settlement real estate was limited to such uses as the husband and wife should appoint, and, in default of appointment, to the use of the trustees during the life of the wife, on trust for her, for her separate use, with remainder to the husband in fee. The husband entered into a contract to sell the property, the purchaser having notice of the provisions of the settlement. The purchase-money was paid to the trustees of the settlement, and a draft conveyance was approved, in the form of an appointment by the husband and wife to the purchaser, but before the conveyance had been executed the husband suddenly died, having, by a will dated before the contract, devised all his real estate to trustees upon trust for his widow for life, and after her death to sell and divide the proceeds as therein directed.

The widow, who was one of the executors, brought an action against the purchaser, the other executors, and the devisees in trust under the husband's will, asking the Court to determine whether she could be compelled to concur in the conveyance to the purchaser, what was the effect of the contract for sale, what would be the devolution of the purchase-money if the contract should be completed, and whether, if the contract was completed by the trustees of the settlement alone, the purchaser would be entitled to compensation out of the purchase-money in respect of the Plaintiff's life interest:—

Held, that the statement of claim was not open to demurrer by the purchaser on the ground that he was not interested in all the questions raised, or on the ground that only a declaratory decree was asked for.

The purchaser also brought an action for specific performance of the contract for sale, subject to the widow's life interest, with compensation in

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respect of that life interest out of the testator's personal estate, and claiming a lien on the purchase-money. The Defendants to this action were the widow, the executors, and the devisees in trust. The devisees in trust and the executors having demurred to the statement of claim, the devisees disclaiming at the same time all interest in the purchase-money:—

The demurrers were ordered to stand to the hearing of the action.

Decision of *Bacon*, V.C., affirmed.

COX *v.* BARKER.

Statement.

THIS action was commenced on the 28th of April, 1876, by *Isabella Cox*, the widow and executrix of *William Sands Cox*, deceased, against *William Barker*, the trustees of the marriage settlement of the Plaintiff, the devisees in trust of the testator, his other personal representatives, one *Thomas Cox*, and the Attorney-General.

The Plaintiff, on the 13th of May, delivered a statement of claim to the following effect:—

By the settlement, dated the 25th of August, 1866, made upon the marriage of the Plaintiff and the testator, two freehold houses in *Paradise Street, Birmingham*, were conveyed to *William Hatton* and *Osborne Reynolds*, as trustees, to such uses as Mr. and Mrs. *Cox* should appoint, and, in default of appointment, to the use of the trustees during the life of the Plaintiff, in trust to pay the rents to her, for her separate use without power of anticipation, with remainder to the use of the testator, in fee.

The testator, by his will, dated the 3rd of February, 1875, bequeathed the residue of his personal estate to *Davie, Hickman, Osborne Reynolds* the younger, *Lloyd, Goodman*, and *Woody*, upon trust to convert and to pay thereout legacies of £500 to each of the children of *Thomas Cox*, and to invest the residue and pay the income of the investments to the Plaintiff during her life, for her separate use, and after her death to pay the residuary personal estate to certain charities: and, after reciting his marriage settlement, the testator devised all the real estate of which he should be seised at his death, or over which he had any power of appointment, to the above-named six trustees, in trust to pay the annual income to the Plaintiff during her life for her separate use, and after her death upon trust to sell the same and to stand possessed of the proceeds on trust for such of the grandchildren of *Thomas Cox* as should be living at the death of the Plaintiff. The testator appointed the Plaintiff and the six trustees executrix and executors of his will.

In September, 1875, the Defendant *William Barker* entered into negotiations with the testator for the purchase of the two houses in *Paradise Street*, and the price agreed upon was the sum which, invested in Consols, would produce an income of £180 per annum (£6000 Consols). The circumstances of the case were fully explained to the trustees of the settlement, and a contract for purchase was entered into between the testator and *Barker* on the 25th of October, 1875, which stated that the premises "are now settled to such uses as the vendor and *Isabella Cox*, his wife, shall jointly appoint, and the vendor will procure a proper assurance of the premises to the purchaser to be executed by all necessary parties."

An abstract of the vendor's title, including the marriage settlement, was sent to the purchaser's solicitor; and, pending the completion of the purchase, some correspondence took place on the subject of the investment and proposed settlement of the purchase-money.

On the 22nd of December, 1875, £6000 Consols were purchased by *Barker* in the names of *Hatton* and *Osborne Reynolds*, the trustees of the settlement, pursuant to the agreement for sale, and a deposit which had been previously paid by *Barker* was thereupon returned to him.

On the 23rd of December, 1875, on which day the conveyance was sent by the purchaser's solicitor for execution by the testator and the Plaintiff, the testator died suddenly without having executed it. The conveyance was, in form, an appointment by the testator and the Plaintiff, under the power contained in their marriage settlement, without any conveyances by the testator and the Plaintiff, or by *Hatton* and *Osborne Reynolds*, of their respective estates or interests in default of appointment. The draft of the conveyance had been previously approved by the solicitors acting for the Plaintiff, but without her express instructions for this purpose.

According to the statement of claim, the Plaintiff, in conversation with the testator and *William Hatton* pending the negotiations already stated, said she thought it a pity to disturb the position of the trust property, but did not either agree or refuse to concur in the sale. She was not informed, and was not aware, that her consent was required to the sale.

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Being advised, after the testator's death, that it lay with herself and the trustees of the settlement to complete, or not to complete, the sale to *Barker*, but that if the sale were so completed the property might, for the purposes of the testator's will, be treated as converted into personal estate during his lifetime, and its destination under the will diverted from the grandchildren of *Thomas Cox* to the residuary charitable legatees; and believing that the testator had not present to his mind, in contracting for the sale, that the effect would be to vary the dispositions made by his will, the Plaintiff declined to concur in or be a party to completing the sale.

At the testator's death, the Plaintiff and the Defendant *Thomas Cox* were his only next of kin. The will was proved by the Plaintiff, *Davie*, *Hickman*, and *Osborne Reynolds* the younger, alone. All the six trustees except *Woody* (who disclaimed in March, 1876) accepted the trusts of the will. In an action commenced by the Plaintiff on the 25th of February, 1876, against *Davie*, *Hickman*, *Reynolds* the younger, *Lloyd*, *Goodman*, and *Woody*, for the administration of the real and personal estate of the testator, *Rotten* was appointed a trustee of the will in the place of *Woody*.

By the statement of claim in *Cox* v. *Barker*, the Plaintiff expressed her desire to have the following questions determined by the Court:—

1. Whether, as between the Defendant *Barker* and the real representatives of the testator, the contract of the 25th of October, 1875, was binding on the Defendant and such real representatives respectively, or whether such contract was or not conditional on the Plaintiff's consenting to, and actually concurring in, the execution of the joint power of appointment vested in the testator and her, and what was the true construction of the contract as between the said parties.

2. Whether *Barker* was entitled, if he should so claim, to have the intended purchase completed by the trustees of the settlement as to the ultimate remainder only in the property, with a compensation out of the purchase-money for the life interest of the Plaintiff therein.

3. Related to the destination of the purchase-money if the contract were valid.

4. Whether, if the contract was not valid and binding as between all the above-mentioned persons, and was not completed in the testator's lifetime, it did or did not operate to convert the testator's ultimate remainder in the property comprised in it from real to personal estate for the purposes of his will, and as between his real and personal representatives.

5. If so converted, whether such property or the £6000 Consols was of the nature of pure personalty, or of personalty savouring of the realty, for the purposes of the residuary bequest of personal estate contained in the will.

6. Whether the Plaintiff could be compelled to concur in any conveyance of the property to the Defendant *William Barker*.

7. Whether, if not so compellable, her concurrence in any such conveyance would alter the ultimate destination of the testator's interest in the property under the dispositions contained in his will.

8. Whether any trusts of the proceeds of sale, or of the testator's interest in the same, were validly declared by the testator in his lifetime.

9. Costs.

And the Plaintiff claimed that these questions might be determined by the Court as between the several parties thereto.

To the whole of this statement of claim the Defendant *William Barker* demurred, "on the ground that the facts alleged therein do not shew any cause of action to which effect can be given by the Court against him, and on other grounds sufficient in law to sustain this demurrer."

BARKER *v.* COX.

THIS action was commenced on the 27th of April, 1876, by *Barker*, against Mrs. *Cox*, *Davie*, *Hickman*, *Osborne Reynolds* the younger, *Lloyd*, *Goodman*, *Rotten*, *Hatton*, and *Osborne Reynolds*. The Plaintiff, by his statement of claim delivered on the 17th of May, 1876, after stating the circumstances relating to the intended purchase, and that Mrs. *Cox* now refused to concur in the conveyance; "alleging, and, as the Plaintiff is advised, according to

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the fact, that she is not bound to concur therein in respect of her life interest in the premises under the settlement," claimed:—

1. Specific performance of the contract of the 25th of October, 1876, by a conveyance to the Plaintiff of the fee simple and inheritance of the property, subject to the estate and interest therein limited to the trustees by the settlement, during the life of and in trust for Mrs. *Cox*, with compensation to the Plaintiff out of the personal estate of the testator in respect of such life interest.

2. A lien upon the £6000 Consols for the amount of the compensation.

3. An injunction to restrain the Defendants *Hatton* and *Reynolds* (the trustees of the settlement) from transferring or disposing of the consols, except under the direction of the Court.

To this statement of claim two demurrers were put in:—

1. A demurrer and disclaimer by *Davie*, *Hickman*, *Reynolds* the younger, *Lloyd*, *Goodman*, and *Rotten*, as trustees of the real estate devised by the will, to the effect that the Plaintiff's claim was bad in law, on the ground that it was, by the contract of the 25th of October, 1875, disclosed to the Plaintiff that the testator was not entitled to sell or dispose of the property as the owner thereof, and that such contract was not binding on the said Defendants. The said Defendants, as such trustees, thereby disclaimed all right, title, and interest to or in the £6000 Consols, and said that if they had been applied to for this purpose before the institution of the action, they would have disclaimed such right, title, and interest, before the institution of the action.

2. Mrs. *Cox*, *Davie*, *Hickman*, and *Reynolds* the younger, as executrix and executors of the testator, put in a defence and demurrer, and thereby admitted for the purpose of the action (but not further) that the Plaintiff was entitled to such specific performance as was claimed of the contract of the 25th of October, 1875; but demurred to so much of the statement of claim as claimed compensation to be paid to the Plaintiff out of the testator's personal estate in respect of Mrs. *Cox's* life interest, or as claimed any lien on the £6000 Consols or any part thereof, or any other right or interest in the same, on the ground that it was by the said contract disclosed to the Plaintiff that the testator was not entitled to sell the

property as the owner thereof. And the Defendants claimed the £6000 as part of the testator's personal estate.

The demurrers came on for argument before Vice-Chancellor *Bacon* on the 17th of June, 1876.

C. A. 1876 Cox v. Barker. Barker v. Cox.

COX *v.* BARKER.

Argument.

SIR *H. JACKSON*, Q.C., and *Chapman Barber*, in support of *Barker's* demurrer:—

So far as *Barker* is concerned, the statement of claim is clearly demurrable, as it seeks to obtain a mere abstract expression of opinion upon matters affecting in certain events the rights and interests of persons interested under the will of *William S. Cox*. In these questions *Barker*, though joined as a Defendant with these persons, has no interest whatever; while as to the only question in which *Barker* is interested—the validity of the contract of October, 1875, and how far it is binding—the Plaintiff, by her statement of claim, neither repudiates nor seeks specific performance of it, and gives no indication whether she will adopt it or decline to be bound by it at the hearing. The Court will not entertain a bill which raises a mere abstract question and asks for no relief; and the Act 15 & 16 Vict. c. 86, s. 50, does not enable a bill to be filed for the purpose of obtaining a mere declaration of right on which consequential relief is neither asked nor could be obtained: *Jackson* v. *Turnley* (1); *Rooke* v. *Lord Kensington* (2); *Bristow* v. *Whitmore* (3). The Court will not, under the new procedure, allow the rights of persons who may have some claim to the purchase-money to be mixed up with the question of specific performance as between vendor and purchaser: *Harry* v. *Davey* (4).

Kay, Q.C., and *Russell Roberts*, for the Plaintiff:—

The objection that *Barker* is interested in some only of the questions raised by the statement of claim is removed by Rules of Court, 1875, Order XVI., rule 4, which expressly provides that "it shall not be necessary that every Defendant to any action shall be

(1) 1 Drew. 617. (3) 4 K. & J. 743.
(2) 2 K. & J. 753. (4) 2 Ch. D. 721.

C. A. 1876 Cox v. Barker. Barker v. Cox. Argument.

interested as to all the relief thereby prayed for, or as to every cause of action included therein"; while rule 13 provides that no action shall be defeated by the misjoinder of parties, and to enable the Court "effectually and completely to adjudicate upon and settle all questions involved in the action," gives power at any stage to add or strike out the names of any party or parties. The action practically asks for a declaratory decree, and by 15 & 16 Vict. c. 86, s. 50, which has not been repealed, no suit shall be open to objection—and therefore the Defendant cannot demur—on the ground that a merely declaratory decree order is sought thereby, provided (according to the decisions cited on the other side) it appears that any consequential relief could be obtained. Can it be said that in no respect can *Barker* be affected by the declaratory decree sought by this statement of claim? As purchaser he is directly interested in the determination of questions 1, 2, and 6, viz., whether the Plaintiff can be compelled to concur, or he (*Barker*) can obtain specific performance with compensation. On the other hand, the Plaintiff, either as executrix of the vendor or as tenant for life of the property contracted to be sold, is entitled to have the question of the validity of the contract decided in the presence not only of the purchaser, but of the real and personal representatives of the vendor: *Roberts* v. *Marchant* (1).

The Defendant *Barker* will not be embarrassed by the mode in which the questions have been raised, as by Order XXXI., rule 6, the Court has power to order that different questions of fact arising in the same action may be tried by different modes of trial.

Sir *H. Jackson*, in reply.

Bacon, V.C., before disposing of this demurrer, desired to hear the demurrers in the other action.

BARKER *v.* COX.

Kay, Q.C., and *Woodroffe*, in support of the demurrer and disclaimer of the trustees of the testator's real estate:—

As the Plaintiff, at the time of entering into the contract, knew

(1) 1 Hare, 547.

the state of the title, and no representation was made to him on the part of the vendor that the fee simple would be conveyed, he is not entitled to partial performance with an abatement in respect of Mrs. *Cox's* life interest, and his action, commenced with full knowledge of the facts, must be dismissed with costs: *Castle* v. *Wilkinson* (1); *Barnes* v. *Wood* (2).

Russell Roberts, for the demurrer of Mrs. *Cox* and her co-executors:—

The Plaintiff, having instituted this action with full knowledge of the circumstances of the title, is not entitled to any abatement from the purchase-money which will form part of the testator's estate. If he is willing to take what can be conveyed to him, these Defendants do not object to his having the agreement so far specifically performed; but he cannot claim repayment of any part of the £6000: *Maw* v. *Topham* (3); *Hooper* v. *Smart* (4).

Sir *H. Jackson*, Q.C., and *Chapman Barber*, for the Plaintiff *Barker*:—

These two demurrers by the same individual Defendants, though raised by separate pleadings and supported by separate counsel, are inconsistent, and if allowed will have the effect of depriving the Plaintiff both of the land and of the purchase-money which he has paid for it. Except in cases where there is a good defence on the ground of hardship, or the like, the Court will insist on a vendor making good his contract to the extent which he is able to make it good, and on his submitting to a proportionate reduction of the purchase-money: *Dart's* Vendors and Purchasers (5). The life interest of the vendor's wife refusing to convey or to release her dower has been held a fit subject for compensation with specific performance in respect of the partial interest: *Wilson* v. *Williams* (6). We distinguish *Castle* v. *Wilkinson*, as in that case the purchaser knew that he was contracting with the husband for the purchase of a married woman's interest—not the fee simple, but the chance of getting the married woman to convey her estate

(1) Law Rep. 5 Ch. 534.
(2) Ibid. 8 Eq. 424.
(3) 19 Beav. 576.
(4) Law Rep. 18 Eq. 683.
(5) Page 1067.
(6) 3 Jur. (N.S.) 810.

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in fee simple. Here the purchaser contracted to take all that *W. S. Cox* (who, subject to his wife's interest, was absolutely entitled) could give, and he is willing to be compensated for Mrs. *Cox's* life interest, if she cannot be compelled to convey it: *Emery* v. *Wase* (1).

Kay, and *Russell Roberts*, in reply.

Judgment, V.-C. B.

Bacon, V.C.:—

Having now heard all these demurrers, the first is by far the most important, as it is founded on what must be admitted to be quite a new rule of this Court. Now I take it that it was the intention of the Legislature, when any question of any sort, or any set of questions, arose, to endeavour by one hearing and one decree to dispose of all the matters in litigation between all the parties who were interested in the subject of the litigation. That object seems to have been in the mind of Mrs. *Cox* when she filed her statement of claim. The statement of claim is remarkably fair and full, and contains no allegation that anybody can, with any reason, object to. It states clearly and explicitly the sort of entangled condition into which the subject of this contract had fallen, and the embarrassing position of the administration of the testator's estate If there is anything to be ascribed to the provisions of the *Judicature Act* other than what I have mentioned, I am at a loss to discover it; and such being the meaning of the Legislature, it is the bounden duty of every Court to give full effect to that meaning. The Act of Parliament, at the same time that it has enabled any person stating a claim to bring before the Court all persons interested in that claim, and to include in the claim every question that can belong to it, or arise out of it, has, at the same time, carefully provided that no one shall be prejudiced by the fact of his being joined. The rules are distinct on the subject. Now the first demurrer is that of Mr. *Barker*, who says he is called upon to be a party to a litigation in the greater portion of which he has no kind of interest, that many of the questions raised do not concern him, and that he cannot be affected by their result in any way. That is the very thing which, in my opinion, the Legisla-

(1) 5 Ves. 846.

ture meant to accomplish. It meant to deal with cases in which there were many persons interested, and many interests involved, and to give the Court power once for all to dispose of those cases, and to dispose of all the interests of many parties. I think Mr. *Barker* has no reason to complain. He has full liberty in his answer to bring forward every right that he can assign, and to bring it forward with no greater risk of failure of justice than would reasonably happen if he were the sole party to the action. It cannot be disputed that the Act (15 & 16 Vict. c. 86, s. 50) which enables the Court to pronounce declarations is in its full vigour. Whether any relief is to be founded on Mrs. *Cox's* claim will depend on the decision of the several questions which she has raised in her statement of claim. I cannot myself perceive that when the Court comes to decide any one of these questions it will leave it with only the expression of an opinion. The Court will not necessarily stop with a mere declaration, but will, as I should expect and believe, give directions in the shape of a decree necessary to carry into effect the opinions which the Court may have expressed. If, in the opinion of the Court, the Plaintiff is compellable to concur in any conveyance to *Barker*, then there must be a direction that she do convey; if she is not compellable, the answer to the question will be conclusive. I do not adopt the view that the provisions of the statute which enables the statement of such a claim as this to be made, and the judgment of the Court to be taken on it, mean that the Court is to express an opinion only and go no further, and I cannot see that Mr. *Barker*, in the face of this Act of Parliament, has any right to complain of the statement of claim delivered by Mrs. *Cox*. I see no harm in permitting Mrs. *Cox's* claim to go on in its regular course, and I see no reason why Mr. *Barker*, although he is nominally associated with other Defendants, should not proceed to state his defence and his title to relief, because title to relief as well as defence are included in the questions raised at the end of Mrs. *Cox's* claim. I think, therefore, that his demurrer cannot be allowed. I overrule it without costs.

With respect to the other two demurrers, His Lordship said that he should neither allow nor overrule them, but he proposed to save the benefit of them until the hearing of the action, when, if

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Mr. *Barker's* action came to a hearing, these demurrers could be argued. The costs would be reserved.

Barker v. Cox. C. A.

COX *v.* BARKER.

BARKER appealed from the overruling of his demurrer. The appeal came on to be heard on the 19th and 22nd of July, 1876.

Sir *H. Jackson*, Q.C., and *Chapman Barber*, for the Appellant, repeated the arguments which they had adduced before the Vice-Chancellor, and cited the same cases.

Kay, Q.C., and *Russell Roberts*, for the Plaintiff, were not called upon.

Judgment, C. A. James, L.J.

JAMES, L.J.:—

By this demurrer two objections are taken. One objection is for multifariousness, but that has ceased to be an objection by the express enactment of the *Judicature Act*, although, of course, it may be stated. Relief might be obtained in another manner, but this is not a ground of demurrer to a statement of claim.

The other ground is, that the Plaintiff merely prays declarations on certain questions, and that no decree giving relief can be made. The statement of claim, however, asks not only for declarations, but for further and other relief, that is, that the proper consequential order may be made, and there would be no difficulty in framing a consequential order based upon the findings on those questions. It would, I think, be easy to direct a conveyance to be made to the proper persons according to one finding, and to direct the money to be dealt with according to the other finding.

Then it is said that in the three cases which were cited under the old law, it was held that, under the Act 15 & 16 Vict. c. 86, a Plaintiff could not file a bill for a mere declaration, unless there were some consequential relief which the Court had the power of giving. It appears to me that in those cases the Court adopted rather a narrow view, though certainly it would not have done to ask the Court to make a declaration upon mere abstract questions,

and possibly it would not be right to ask a Court of Equity to decide something which would have to be determined in a Court of Law.

In the present case, declarations are asked with regard to certain rights for the purpose of clearing the estate which has to be administered. The case is very fairly stated, and it is right that the questions should be determined, the contract having been entered into by a deceased person, and his representatives having conflicting interests with regard to it. The real representatives take one view, and the personal representatives take another view, and the estate must be administered.

Judgment, C. A. James, L.J.

It appears to me that the Vice-Chancellor was quite right in saying that there is a subject-matter for decision, and that it is proper that the questions should be answered, and that the Court should retain in its hands the power of giving consequential relief.

Then, as to the difficulty suggested, that the Defendant *Barker* will be kept here as a party while questions in which he is not interested are dealt with and disposed of, one of the most beneficial of the rules under the new system is, that it is quite competent for the Court to say, We will have those two questions in which he is interested tried first—the two first questions, which relate entirely to the demurring Defendant, viz., as to what are his rights under the contract—and the Court can put those two questions in the course of trial in the first instance, and determine them as between him and the other parties, and he will not be prejudiced in any way by the other matters which have to be disposed of. It seems to me it would be quite right that the Court should determine, in the first instance, what are the rights of Mr. *Barker* as against the representatives of the testator.

I think the Vice-Chancellor's order was quite right, and the appeal must be refused with costs.

Mellish, L.J.:—

Mellish, L.J.

I am of the same opinion. The real question is, whether more actions have not been brought here than was necessary, there being apparently three actions altogether. But that is not the question now before us. If there are too many actions an order may be made by the Court to consolidate them, or to deal with

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them in some other way which will remedy that objection. I agree that this is not a demurrable statement of claim.

BAGGALLAY, J.A. :—

I am of the same opinion.

So far as regards the objection of multifariousness, as the Lord Justice *James* has pointed out, that is expressly met by the orders under the Judicature Acts, and any such difficulty as has been suggested is met by the 1st, 8th, and 9th rules of Order XVII.

I felt a good deal pressed at first by the decisions of Vice-Chancellor *Wood* in the cases of *Rooke* v. *Lord Kensington* (1) and *Bristow* v. *Whitmore* (2); but it appears to me there is no room in this case for the objection which prevailed there. The 50th section of the 15 & 16 Vict. c. 86 empowers the Court of Chancery to make binding declarations of right without giving consequential relief; and Vice-Chancellor *Wood* was of opinion that it only empowered the Court to make such declarations of right in cases in which some equitable relief might be granted if the Plaintiff chose to ask for it.

But, in this case, it appears to me that, consequential upon the declaration of rights which is asked for, several forms of consequential relief might be granted. It is only necessary to mention one. £6000 Consols have been placed in the names of the trustees of the settlement, and the consequential relief upon the declaration would be a direction as to the application of that fund.

BARKER *v.* COX.

THE trustees of the testator's real estate appealed from the order that their demurrer should stand to the hearing. The appeal came on to be heard on the 22nd of July, 1876.

Argument.

Kay, Q.C., and *Woodroffe*, for the Appellants, repeated the arguments which they had addressed to the Vice-Chancellor, and cited the same cases. They also argued that they had no interest in the purchase-money, which did not even stand in their names, and that every question could be decided on the demurrer.

(1) 2 K. & J. 753. (2) 4 K. & J. 743.

Russell Roberts, for the executrix and executors, who had not appealed.

Sir *H. Jackson*, Q.C., and *Chapman Barber*, for the Plaintiff, were not called upon.

James, L.J.:—

Judgment, C. A. James, L.J.

I am of opinion that this demurrer was properly dealt with by the Vice-Chancellor. He did not intend to decide the matter finally, and the fact is, that these trustees are not the persons really interested in the question. They are only trustees, and in their characters of trustees and executors they have no beneficial interest. The real question is as between Mr. *Barker* and the real and personal estates of the testator. The persons interested in the real and personal estates take different views of the matter; and therefore it is fitting that the whole matter should be determined, not upon the demurrer of the trustees, who have no interest in it in their character of trustees, but that it should be dealt with in the presence of all the parties. It appears to me that there ought to be no difficulty in having the whole thing disposed of, there being no disputed facts upon the statement of claim and defence, in the presence of everybody, just as cheaply and as expeditiously as upon demurrer. The objection to deciding it upon demurrer is, that that would be a decision only between the Plaintiff and the demurring parties, and would not determine the case as between them and the other parties. I think, therefore, that the Vice-Chancellor was quite right in saying, Let this demurrer stand to the hearing, and then I will give a decision in the presence of all the parties. The appeal will be refused with costs.

Mellish, L.J., and Baggallay, J.A., concurred.

Solicitors for Mrs. *Cox* and for Trustees and Executors: *Kennedy, Hughes, & Kennedy*, agents for *Palmer, Son, & Broughton, Birmingham.*

Solicitors for *Barker*: *Gamlen & Son*, agents for *W. Cottrell, Birmingham.*

C. A.
1876
July 24.

WADE-GERY *v.* HANDLEY.

[1870 W. 59.]

Will—Executory Limitation—Destination of Rents till happening of Event.

A testator devised estates to trustees and their heirs upon trust to accumulate the rents until the expiration of the term of twenty-one years, and after the expiration thereof to stand possessed of the estates in trust for the second and every other younger son successively of his nephew *W.* in tail male, and failing such issue, in trust for the first and every other son of his nephew *H.* in tail male, with divers limitations over; and he gave a fund of personal estate to be held on similar trusts. At the expiration of the term *W.* and *H.* were both living, and each had an only son:—

Held (affirming the decision of *Bacon*, V.C.), that until it should be ascertained whether there would be a second son of *W.*, the rents of the real estates and the income of the personal estate were undisposed of and belonged respectively to the heir-at-law and next of kin.

Sidney v. *Wilmer* (1) not followed.

THIS was an appeal by the Plaintiff from a decision of Vice-Chancellor *Bacon* (2).

Argument.

Yate Lee, for the Appellant:—

We rely on *Sidney* v. *Wilmer*, which conflicts with *Hodgson* v. *Earl of Bective* (3). The Vice-Chancellor approved of *Sidney* v. *Wilmer*, and would have followed it had he not supposed that the decision of Vice-Chancellor *Wood* had been affirmed by the House of Lords. It was so on other points, but on this point there was no appeal. The case, therefore, rests on the authority of Lord *Westbury* against that of Lord *Hatherley* when Vice-Chancellor, and the Vice-Chancellor in the present case expressed his opinion that the former decision was preferable.

Hemming, Q.C., and *Maidlow*, for the representatives of the heir-at-law and next of kin:—

This point was only a minor point in *Sidney* v. *Wilmer*.

[JAMES, L.J.:—I do not see how to distinguish this case from that.]

(1) 4 D. J. & S. 84.

(2) 1 Ch. D. 653, where the facts will be found fully stated.

(3) 1 H. & M. 376.

It is equally difficult to distinguish it from *Hodgson* v. *Earl of Bective* (1), and that case must be taken as overruling *Sidney* v. *Wilmer* (2). The point was not taken by counsel in *Sidney* v. *Wilmer*, being, no doubt, considered by them to be untenable. Such a thing was never heard of as that, where there are executory limitations to one class of issue, and in default of such issue executory limitations to another class of issue, the second should be held to take a vested interest liable to be divested on the first class coming into *esse*. The subject was considered in *Holmes* v. *Prescott* (3).

[*Re Mowlem* (4) was also referred to.]

MELLISH, L.J.:—The alterations made by the House of Lords in the decree in *Countess of Bective* v. *Hodgson* (5) are an affirmance of the principle of the Vice-Chancellor's decision as to the rents.

Yate Lee, in reply.

JAMES, L.J.:—

The decision of Lord *Westbury* is so different from all the other authorities, that it cannot warrant us in going against the law so clearly settled by *Hodgson* v. *Earl of Bective*.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors: *A. F. & R. W. Tweedie; J. E. Fox & Co*

(1) 1 H. & M. 376.
(2) 4 D. J. & S. 84.
(3) 12 W. R. 636.
(4) Law Rep. 18 Eq. 9.
(5) 10 H. L. C. 656, 671.

C. A.
1876
V.-C. B.
June 1.
C. A.
July 26.

CASHIN *v.* CRADOCK.

[1875 C. 8a.]

Striking out Pleadings—Rules of Court, 1875, *Order* XXVII., *r.* 1.

The whole of a statement of claim, parts of which are unintelligible, other parts of which are irrelevant, and other parts of which contain offensive charges against the Defendants, may be struck out under Order XXVII., rule 1, of the Rules of Court, 1875.

Order of *Bacon*, V.C., affirmed by *James*, L.J., and *Mellish*, L.J.; *Baggallay*, J.A., doubting.

Statement.

THE statement of claim in this case was deliverd by *T. F. Cashin* against five persons as Defendants, and appeared to relate to the sale of a colliery. The statement was not signed by counsel, and the frame and nature of it are stated by the Vice-Chancellor *Bacon* and by the Lord Justice *James* in their judgments.

Two of the Defendants moved before the Vice-Chancellor *Bacon*, on the 1st of June, 1876, that the statement of claim should be struck out.

Argument.

Kay, Q.C., and *Freeling*, in support of the motion, referred to Order XVI. and Order XXVII. of the Rules of Court, 1875.

Sir *H. Jackson*, Q.C., *Hastings*, Q.C., *Bush*, and *Warmington*, for other Defendants, who had given similar notices of motion.

Sir *H. S. Giffard*, *S.G.*, and *Romer*, for the Plaintiff, contended that, under the new practice, by which parties might draw their own pleadings, and the signature of counsel was no longer required, greater laxity was allowed.

Judgment, V.-C. B.

BACON, V.C.:—

This is a very peculiar case. The Legislature has taken a different view from that which before prevailed of what ought to be the practice in these and in other Courts, and now it is

competent to any man to state his own case in his own way. But that is the only privilege which in that respect has been granted to suitors. They have not acquired the privilege of abusing the practice of the Court, or of bringing foul and offensive charges against the persons who are sued as Defendants, which charges the Defendants have no competent means of meeting. Even if the charges were not foul and offensive, as many of them are, they are such as the Defendants could not by any possibility answer. Many of them are wholly irrelevant to the case which the Plaintiff is supposed to state by his statement of claim; many of them are wholly unintelligible. It would be an abuse of the practice of the Court to permit such a document as this to remain upon the file.

It is not for me to point out to the Plaintiff how he might frame his statement of claim if he has any cause of complaint against the Defendants. If he does not take advice, he must run the risk of acting upon his own judgment. But it is my plain duty not to permit the practice of this Court to be made an instrument of oppression, and I think that I should oppress the Defendants grievously if I suffered them to be called upon to answer such a statement as this. The statement is unintelligible, and inexcusable in many respects; it is incoherent; there are inconsistencies between asking for a specific performance of the contract, and the enforcement of the consequences of the non-execution of a decree in which that contract was involved. It would be impossible to deal with such a case as the Plaintiff states. It is a mercy to him not to permit such a statement to remain upon record. The consequence of its remaining would most likely be utter defeat to the Plaintiff, even if he has any right claim. All that I can do is to direct this statement to be struck off the records of the Court. At the same time, I cannot withdraw from the Plaintiff, and I will not withdraw from him the right to make another statement if he has cause of complaint. If he has any case, it will not be difficult for him, with his own intelligence, or with the assistance of persons who can advise him, to state his case; but it would be a most abominable oppression to call upon the Defendants to meet a case which from beginning to end they can hardly be supposed to ascertain

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from the statement. Therefore this statement must be struck out as being an abuse of the practice of the Court as altered by the *Judicature Act*, and the Plaintiff must pay the costs of this motion.

C. A.

The Plaintiff appealed, and the appeal came on for hearing on the 26th of July, 1876.

Argument.

The Plaintiff in person in support of the appeal :—

Order XXVII., rule 1, empowers the Judge to strike out any matter in a statement which may be scandalous or tend to prejudice, embarrass, or delay the fair trial of the action, but this clearly does not mean that the whole statement may be struck out. What, then, becomes of the action, and how can it be tried fairly or otherwise? Any part which is scandalous might have been struck out, or, if the statement was unintelligible, the Defendants might have demurred; that is the course pointed out by the orders, and the Defendants ought to have followed it.

Kay, Q.C., and *Freeling*, for the two Defendants, and

Warmington, for other Defendants, were not called upon.

Judgment, C. A. James, L.J.

JAMES, L.J. :—

I think that the Vice-Chancellor could not have done otherwise. It seems to me that upon this statement of claim there is some ground of complaint, assuming, of course, that some of the statements are true, but they have been so mixed up with other matters that I do not think it is possible for the Court or Judge to strike out any one part.

The Vice-Chancellor has held that this was an abuse of the practice of the Court, and it appears to me that he was right. First of all, there is a long story about a conspiracy to inveigle or intimidate this gentleman into doing something which he did not do. That can only be inserted for the purpose of prejudice. Then he says that he made an agreement, and stuck to that agreement, but some of the Defendants have tried to inveigle and intimidate him into altering it, and have written letters to him which were false. It is impossible to answer that statement. Then the Plaintiff says

that there were motions in Court and bills in Court; the bill was false, supported by false affidavits; the motion for a receiver was on false grounds, supported by a false affidavit. There is not a single thing throughout the whole proceedings which have taken place as to which there are not those charges. It is utterly impossible, therefore, for us to hear the Plaintiff upon those charges, because they are not relevant to any issue. He says that he had an agreement, of which agreement he wanted to have specific performance, and that he has obtained a decree by consent, which, to a certain extent, gives him that, but he has been deprived of it since by some one. It is not for me to tell him how to frame his claim. One can conceive that there might be a ground for such a claim if expressed by a proper statement, but it is impossible for several Defendants to be called upon, as the Vice-Chancellor said, to answer statements of this kind, containing charges of falsehood and perjury, the whole of them being quite irrelevant to the case. And I do not think it is possible to separate these statements, or that the claim can be amended in such a way as really to strike out what is wrong. The Vice-Chancellor has said that he does not mean to deprive the Plaintiff of the right to make a proper statement of claim. Let him do it himself, or get advice how to put his claim in some manner by which the Defendants can be made reasonably aware of the complaints they are to meet. I think it would be shocking if, under the new procedure, such a thing as this could be entertained. In the old Court of Chancery, I do not recollect such a bill as this, so mixed up with irrelevant matter as this statement of claim is. That is the ground upon which the Vice-Chancellor proceeded, and I think the Vice-Chancellor was right.

Mellish L.J. concurred

BAGGALLAY, J.A.:— Baggallay, J.A.

As both of the Lords Justices concur in the judgment of the Vice-Chancellor, it does not matter what my opinion on this case is; but I must confess that, not having had an opportunity of hearing counsel on the other side, I do entertain some doubt whether the order of the Vice-Chancellor was right.

I am disposed to doubt, having regard to Order XVI., as well as to the terms of Order XXVII., which is more particularly under

C. A. 1876 CASHIN v. CRADOCK.

consideration, whether the Plaintiff in this case had not a right to introduce into the same statement of claim the various matters in respect of which he claimed relief. At the same time I feel bound to say that this statement of claim is drawn in a way and in a form which nobody can approve of, and I certainly should have desired to concur in the view that was taken by the Vice-Chancellor; but at the present moment I do entertain doubt, though certainly not sufficient doubt to induce me to dissent from the decision which has been expressed.

JAMES, L.J.:—

The appeal will be dismissed with costs, but without prejudice to the delivery of any other claim.

Solicitor for Plaintiff: *T. A. Jones.*
Solicitors for Defendants: *Torr & Co.; Bradford & Co.*

C. A. 1876 V.-C. M. *July* 28. C. A. *Aug.* 2.

WATSON *v.* RODWELL.

[1876 W. 103.]

Appeal—Discretion—Pleading—Striking out—Rules of Court, 1875, *Order* XXVII., *r.* 1.

Where pleadings are such as should be struck out, they ought to be struck out by the Judge, and not left to be dealt with as a question of costs; but where the Judge of the Court below has exercised his discretion on the subject, the Court of Appeal will not interfere, unless he has acted on a wrong principle.

Charges and statements which would not have been improper under the former system may nevertheless be struck out under the Judicature Acts.

Statement.

THE statement of claim in this case was delivered by *Mary Ann Watson* against her former solicitor, *Morley Rodwell*, and prayed for an account, and for damages for his wrongful doings. The statement was in fifteen folio pages, and related to the proceedings under the will of one *William Watson*. There were many paragraphs containing charges, two of which were: 26. "Plaintiff charges that under the circumstances aforesaid (apart from other matters in respect of which Plaintiff has, as herein appears, ground for complaint of the Defendant's conduct) the Defendant, in the

course of action pursued by him as her solicitor in reference to the said petition and compromise, and in authorizing the payment to the said Messrs. *Kimber & Ellis* of the amount of their costs without taxation, grossly violated or grossly neglected his duty to Plaintiff as such solicitor." 28. "Such last-mentioned letter was written by Defendant with the view or object of further confirming Plaintiff in the belief which she then entertained that the Defendant was really working in and for the protection of Plaintiff's interests, and desired to free her from and keep her out of any further litigation, and succeeded in such object." The 51st paragraph was: "It has been the habit and practice of the Defendant to impose upon the Plaintiff's inexperience and credulity by an affectation or pretence of indignation when any inquiries were made or questions asked of him touching the affairs of the testator; and whenever such inquiries were made of the Defendant the Defendant has diverted the same by simulation of being offended at doubts of his honour, and of profuse assurances that if everything were left in his hands it would be perfectly right."

Statement.

The Defendant gave notice of motion that the whole of the statement of claim might be struck out as not a proper pleading, and as prolix and tending to prejudice and embarrass the fair trial of the action; or that nineteen specified paragraphs, including the three above stated, might be struck out.

The motion came before Vice-Chancellor *Malins*, on the 28th of July, 1876.

Glasse, Q.C., and *Renshaw*, in support of the motion:—

Argument.

The present pleading would have been irregular even under the old practice, and under the new rules charges are quite improper.

Higgins, Q.C., and *Fooks*, for the Plaintiff, referred to *Golding* v. *Wharton Saltworks Company* (1), and having offered to strike out paragraph 51, were stopped by the Court.

MALINS, V.C., after referring shortly to some of the allegations, continued:—

Judgment, V.-C. M.

I have great doubt as to whether paragraph 51, if it had been

(1) 1 Q. B. D. 374.

C. A. 1876 WATSON v. RODWELL. Judgment, V.-C. M.

insisted upon, would not have had to be treated as scandalous. But with that exception there is not, in my opinion, a single statement which would not have been proper under the old system of pleading. It is doubtless true that greater strictness is required under the *Judicature Act*, and that Order XIX., rule 4, of the Rules of Court, 1875, provides that every pleading shall contain, as concisely as may be, a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved. If that had been all, I think that in the case of any party violating the rule by making a pleading less concise than was absolutely necessary, the proper plan would be to apply at the hearing that the offending party should pay the costs occasioned thereby. But then Order XXVII., rule 1, empowers the Court or a Judge to order to be struck out any matter which may be scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action. Now I do not find any matter in this statement of claim in any degree calculated to prejudice, embarrass, or delay the fair trial of this action. This is a discretionary rule, and if the Court were to give any encouragement to striking out parts of pleadings in doubtful cases, it would be impossible to get through the business. Therefore, as far as I am concerned, I discourage such applications. In my opinion, it will cause the Defendant no difficulty to answer this statement of claim. I therefore refuse this application with costs.

C. A. The Defendant appealed, and the appeal came on to be heard on the 2nd of August, 1876.

Argument. *Glasse*, Q.C., and *Renshaw*, for the Appellant, referred to Order XIX., rules 24, 25, 26, and Order XXVII., rule 1.

Higgins, Q.C., and *Fooks*, for the Plaintiff:—

This is an order which cannot be appealed from: *Golding* v. *Wharton Saltworks Company* (1).

[MELLISH, L.J.:—But if such orders cannot be appealed from, how are pleadings to be kept within bounds?]

The Vice-Chancellor exercised his discretion, and did not consider

(1) 1 Q. B. D. 374.

the pleadings scandalous or embarrassing, and this Court will not overrule him. It is not the fact that the statement of claim is improperly drawn or prolix. These statements are necessary for the case of the Plaintiff.

JAMES, L.J. :— Judgment, C. A. James, L.J.

I should have been well satisfied if the Vice-Chancellor had struck out these paragraphs, but I do not think the statements so wrong or so prolix as to induce us to differ from the conclusion at which the Vice-Chancellor arrived. He seems to have taken the pains to read the statement of claim, and we shall not overrule his discretion. It is, no doubt, under the new rules, important to prevent the pleadings from being a source of oppression, and from being as prolix as they often were under the old system; but it is also important, in order to save expense, not to encourage appeals from one Court to another upon things which are within the discretion of the Judge. We shall not, however, give any costs of the appeal, and we hope that the pleader will take the opportunity to amend the statement of claim.

MELLISH, L.J. :— Mellish, L.J.

In the case of *Golding* v. *Wharton Saltworks Company* (1), which was the first case before us, we held that striking out pleadings was a matter of discretion, and that, except in very extreme cases, or where the Judge has adopted a wrong principle, we should not interfere with that discretion. In the only other case, *Cashin* v. *Cradock* (2), we affirmed the Judge's decision; and though in this case it is difficult to understand what is the precise object of many of the statements, I do not think that we can interfere with the discretion of the Vice-Chancellor, as we cannot say that he has acted on a wrong principle.

The Plaintiff has stated a real and substantial ground of complaint, and the question is how she has presented it. I do not agree that what might have been allowed in a bill under the old system can now be allowed, and that charges can be put in merely to shew the view taken by the pleader. There are many para-

(1) 1 Q. B. D. 374. (2) *Ante*, p. 376.

C. A. 1876 WATSON v. RODWELL.

graphs in this bill which are not statements of fact, and are of no use; but it is not to be expected that we in the Court of Appeal shall employ our time in striking out such pieces of pleading.

Judgment, C. A. Baggallay, J.A.

BAGGALLAY, J.A.:—

The Legislature has thought fit to confer on the Judges the power of striking out pleadings which are prolix or tend to embarrass the fair trial of the action. But the Judge has to exercise his discretion upon any statement which is brought under his consideration. This statement of claim seems to have been very fully considered by the Vice-Chancellor, and he arrived at the conclusion that the matters complained of were not scandalous, and ought not to be struck out. As a member of the Court of Appeal I should be unwilling to differ from the Vice-Chancellor on a matter of discretion, and I cannot think that he declined to strike out these paragraphs because they could be considered on the taxation of costs. There is much of this statement which ought not to have been inserted, and I hope that an opportunity will be taken to amend the statement of claim. We will give all necessary leave for the purpose.

Solicitors for Plaintiff: *Stevens & Co.*
Solicitor for Defendant: *Morley Rodwell.*

C. A. 1876 *July* 28.

In re EUROPEAN ASSURANCE SOCIETY.

DOWSE'S CASE.

Insurance Company—Dissolution—Transfer of Liabilities—Notice of Contents of Deed of Settlement.

By the deed of settlement of the *R. N. Society*, it was provided that the funds and property of the society should alone be answerable for claims on the society, and there were provisions enabling the society to make over its business to another company. The society granted an annuity to *D.* by a deed executed by three directors, which declared that the stocks and funds of the society should during the life of *D.* be liable to pay the annuity. Some years after this the *R. N. Society* made over its business to the *E. Society* in

manner authorized by the deed of settlement. Both societies being under winding-up, *D.* claimed against the *R. N. Society*:—

Held, that the omission in the annuity deed of any express reference to the deed of settlement did not distinguish the case from *Hort's Case* (1), and that *D.* could only claim against the *E. Society*.

C. A. 1876 DOWSE'S CASE.

THIS was an appeal from a decision of the arbitrator under the *European Assurance Society Arbitration Acts*, that Miss *Dowse* was not entitled to prove against the *Royal Naval, Military, and East India Company Life Assurance Society*.

Statement.

The material clauses of the deed of settlement, dated the 1st of January, 1839, of the *Royal Naval and Military Society*, are stated in the report of *Hort's Case* (1).

On the 11th of April, 1850, the society having agreed to grant Miss *Dowse* a life annuity of £10, a policy signed and sealed by three of the directors was issued to her, which (omitting some clauses not material for the present purpose) was as follows:—

"To all to whom these presents shall come, we the undersigned, being three of the directors of the *Royal Naval, Military, and E. I. Co. Life Assurance Society*, send greeting: Whereas we have, on behalf of the society, contracted to sell to *Frances Dowse*, of, &c., one annuity or clear yearly sum of £10 during the life of *Frances Dowse* for the sum of £113 17*s*: And whereas the said *F. Dowse* hath paid at the office of the said society the sum of £113 17*s*., in notes of the Government and Company of the *Bank of England*, and in cash, for the purchase of the said annuity: Now these presents witness that, in consideration of the said sum of £113 17*s*. so paid by the said *F. Dowse* at the office of the said society, as hereinbefore mentioned, the stocks and funds of the said society shall from time to time during the life of the said *F. Dowse* be subject and liable to pay to the said *F. Dowse*, or her assigns, at the office of the said society for the time being, one annuity or clear yearly sum of £10, by two equal half-yearly instalments, on the, &c., without any deduction or abatement: Provided always that the directors executing this policy shall not be responsible to any greater extent than the funds and property of the society in their hands or power at the time of any claim being made under this policy shall be competent to discharge, and that no proprietor

(1) 1 Ch. D. 307.

C. A. 1876 DOWSE'S CASE.

shall in any event be liable beyond the amount of the unpaid proportion of his share or shares in the subscribed capital of the society. In witness, &c."

Statement.

In 1866 the business of the *Royal Naval Society* was made over to the *European Assurance Society* in manner stated in the report above referred to.

Both associations being now in course of winding up, Miss *Dowse* claimed to prove against the *Royal Naval Society*, and her claim having been disallowed by the arbitrator, the present appeal was brought.

Argument.

Hemming, Q.C., *Cookson*, Q.C., and *Grosvenor Woods*, for the Appellant:—

Our case is distinguished from *Hort's Case* (1) by the material fact that our contract contains no reference to the deed of settlement. We, therefore, are not subject to be handed over to another company, as we never contracted to that effect.

[MELLISH, L.J.:—Was not the effect of our decision in *Hort's Case* this, that as soon as the amalgamation has taken place the capital of the old company is no longer capital that can be called up, so that there cannot be any fund applicable to the discharge of the claim?]

That reasoning would apply if I were now asking for a winding-up order. But the order exists, and must be treated as valid until it is discharged. That was so held in the *Arthur Average* case (2).

We have capital in this case. There is a liquidator with assets in his hands.

[JAMES, L.J.:—How do you distinguish this from *Hort's Case?* The directors, by your contract, say on behalf of the society that the funds of the society shall be answerable. Does not that refer you to the deed of settlement as much as if it was in terms referred to?]

Hort's Case appears to turn on the expression that the funds of the society should be answerable "according and subject to the provisions of the deed of settlement." It was expressly by force

(1) 1 Ch. D. 307. (2) Law Rep. 10 Ch. 542; *post*, 522.

of those words that *Hort* was held to have given the society by contract the right to transfer their assets and liabilities. *Greenwood's Case* (1) is against incorporating clauses that are not referred to.

Higgins, Q.C., and *Romer*, for the liquidators, were not called upon.

JAMES, L.J.:—

Judgment, James, L.J.

It is impossible to distinguish this case from *Hort's Case* (2). That case was very fully considered, and the legal position of the parties was explained. It was there settled that there could be no claim against assets which under the deed of settlement had been transferred to another company. The question is whether the omission from the present policy of the words "according and subject to the provisions of the deed of settlement of the said society," which occurred in *Hort's* policy, can make any difference between that case and this. In each case the directors, *quâ* directors, contract that the funds of the society shall be liable, and that must mean shall, according to the deed of settlement, be liable; the omission of those words being, in my opinion, wholly immaterial.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors: *Mercer & Mercer; J. V. Musgrave.*

(1) 3 D. M. & G. 459. 18 Jur. 387 (2) 1 Ch. D. 307.

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In re EUROPEAN ASSURANCE SOCIETY.

RAMSAY'S CASE.

Contributory—Past Member—Compulsory Registration—Companies Act, 1862, *ss.* 209, 196, 38.

An insurance company registered under 7 & 8 Vict. c. 110, was afterwards registered under the *Companies Act*, 1862, pursuant to sect. 209, which obliges such companies so to register themselves "in the manner and subject to the regulations" thereinbefore contained. On the company being wound up, a person who had parted with his shares in the company within a year before the winding-up resisted being placed on the list of contributories as a past member, on the ground that sect. 38, which makes past members liable, applied in terms only to companies formed under the Act, and that the words in sect. 209 "subject to the regulations hereinbefore contained" did not import it into a case of compulsory registration:—

Held, that the effect of the Act was to put a company compulsorily registering itself under sect. 209 in the same position as if the registration had been voluntary, and that the 38th section applied to such a company.

Statement.

THIS was an appeal by Dr. *Ramsay* from a decision of the arbitrator under the *European Assurance Society Arbitration Acts*, 1872, 1873, and 1875, that he was liable to be on the list of contributories as a past member.

The *European Society* was originally registered under 7 & 8 Vict. c. 110. In 1862 it was registered under the *Companies Act*, 1862, pursuant to sect. 209, which obliges every insurance company registered under the former Act to register itself under the latter. The Appellant took shares in the year 1867, and transferred them in the regular way to a purchaser on the 26th of January, 1871. The winding-up of the society commenced on the 10th of June, 1871, and Dr. *Ramsay* was placed on the B list of contributories under sect. 38 of the Act, as having been a member within a year before the commencement of the winding-up.

Argument.

Cookson, Q.C., and *Jason Smith*, for the Appellant:—

We contend that sect. 38 of the *Companies Act*, 1862, does not apply where a company is compulsorily registered under sect. 209. The latter section directs that the company shall register itself "in manner and subject to the regulations hereinbefore contained."

C. A. 1876 RAMSAY'S CASE. Argument.

"Regulations" as to registration are found in sect. 179. Sect. 180 authorizes certain companies to register themselves, and sect. 183 prescribes the formalities which are to be gone through. Then we have sect. 196, which places a company that voluntarily registers itself in the same position as if it had been originally formed under the Act. The question is whether that section applies to a company compulsorily registered. The Act 7 & 8 Vict. c. 110, under which this company was formed has a clause, sect. 66, making past members liable for three years. That Act is now repealed. Sect. 196 cannot be called a regulation, and the terms of sect. 209 are insufficient to import it.

[JAMES, L.J. :—According to your argument, sect. 35 would not apply.]

It is submitted that it would; for there is nothing in its terms to restrict it to companies formed under the Act.

[MELLISH, L.J. :—How could the company be wound up?]

Part IV. is not confined to companies formed under the Act.

[MELLISH, L.J. :—The argument against you is, that "subject to the regulations" incorporates Part VII., and then Part VII. incorporates nearly the whole of the Act. Then, too, there are two parts of sect. 196 which must have been intended to apply.]

In the next place we contend that, having regard to the provisions of the deed of settlement, the statutory liability under sect. 38 does not apply to a person in the Appellant's position. By the terms of the deed of settlement a shareholder who parts with his shares is to be under no further liability to the company, and is to be indemnified by the company against all liabilities to other persons. Under these circumstances he is not a contributory: *Clarke's Executors' Case* (1); *Waterhouse* v. *Jamieson* (2).

Higgins, Q.C., and *Romer*, for the liquidators, were not called upon.

Judgment, James, L.J.

JAMES, L.J. :—

Having regard to the whole purview of the Act, I think that a company registered in pursuance of sect. 209 becomes subject to

(1) Reilly's Alb. Arb. Cases, 223. (2) Law Rep. 2 H. L., Sc. 29.

C. A. 1876 RAMSAY'S CASE. Judgment, James, L.J.

sect. 38. If the effect of sect. 209 is merely to incorporate regulations as to the mode of registration, a company registered under it is left almost entirely out of the Act. There is one particular section, the 193rd, to which I may refer as shewing that this limited construction of sect. 209 is impossible. There is nothing whatever dealing with the property of an existing company which registers under the Act, or giving the company on registration the powers or rights of an incorporated company in relation to such property, except sect. 193. "All such property, real and personal, including all interests and rights in, to, and out of property, real and personal, and including obligations and things in action, as may belong to or be vested in the company at the date of its registration under this Act, shall on registration pass to and vest in the company as incorporated under this Act for all the estate and interest of the company therein." This section must, from the very necessity of the case, have been intended to apply to a company registered under sect. 209. Otherwise the new company could not sue or be sued under the Act in respect of previously acquired property. The word "regulations" cannot therefore be taken in the confined sense contended for by the Appellant. A company that is compelled to register is put in the same position as a company voluntarily registered, and has all the advantages and all the liabilities of the Act, including sect. 38. The Appellant, therefore, is liable to be put on the list B of contributories as a past member.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors: *Lewty; Mercer & Mercer.*

In re EUROPEAN ASSURANCE SOCIETY.

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July 28, 31.

MILLER'S CASE.

Novation—Policy—Indorsement.

M. effected a policy upon his life with the *B. N. Association.* The *B. N. Association* subsequently was amalgamated with the *E. Society*, and ceased to carry on business. Some time afterwards a memorandum under the seal of the *E. Society*, and signed by two of its directors, was indorsed on the policy, declaring that the funds of the *E. Society* should be liable for the payment of the policy money, provided the future premiums were paid to the *E. Society*. The subsequent premiums were accordingly paid to the *E. Society* :—

Held, that there was a complete novation, and that on the winding-up of the two companies, *M.* had no right of proof against the *B. N. Association.*

Statement.

THIS was an appeal by *Robert Miller* from a decision of the arbitrator under the *European Society Arbitration Acts*, that he was not entitled to prove as a creditor in the liquidation of the *British Nation Life Assurance Association*, hereinafter referred to as "*The British Nation.*"

The *British Nation* was constituted as a life assurance company under a deed of settlement dated the 28th of February, 1855, and was registered under 7 & 8 Vict. c. 110.

On the 17th of March, 1856, *Miller* effected a policy, No. 115, on his life, with the *British Nation* for £200, without participation in profits.

In 1865, negotiations took place for the amalgamation of the *British Nation* with the *European Assurance Society*, and on the 16th of March, 1865, a deed was executed by which the two companies agreed—

"That on, from, and after the execution of these presents, the association and the society are and shall be and become united, amalgamated, and consolidated as one association, society, or company, under the name or style of the *European Assurance Society*, until such name or style shall be changed by the authority of Parliament."

The policy-holders in the *British Nation* were not in any way

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MILLER'S CASE.

Statement.

consulted in regard to the amalgamation, nor was any circular or notice stating the fact of the amalgamation, when effected, sent to them.

Under the terms of the amalgamation, the shareholders in the *British Nation* became entitled to shares in the *European Society*, and upon the amalgamation being completed, the *British Nation* ceased to carry on business.

On or about the 7th of February, 1867, the following indorsement was made on *Miller's* policy:—

"The *European Assurance Society.*

"*Chief Office*, 316, *Regent Street, London.*

"Memorandum.

"It is hereby declared, that subject to the proviso hereunder stated, the funds and property of the *European Assurance Society of London*, as provided for in the deed of settlement of the said society, shall be liable for the due payment of the sum of £200 (without profits), assured by the within policy with the *British Nation Life Assurance Association of London*, to the person or persons legally entitled to receive the same. Provided always, that the future premiums payable in respect of the said policy be duly paid to the said *European Assurance Society* at the times and in the manner set forth in the said policy. In witness," &c.

This indorsement was sealed with the common seal of the *European Society*, and signed by two of the directors of that society. It did not appear under what circumstances it was indorsed; but as the policy was now in *Miller's* possession, the Court considered that it was to be inferred that he had assented to the indorsement being made.

The receipts afterwards given for premiums were headed "*European Assurance Society*," and contained no reference whatever to the *British Nation.*

On the 12th of January, 1872, an order was made for winding up the *European Society.* The *British Nation* went into voluntary liquidation by an extraordinary resolution passed on the 18th of January, 1872, and the liquidation was, by order dated the 20th of January, 1872, continued under the supervision of the Court.

The arbitrator having decided that *Miller* had only a right of

proof against the *European Society*, and not against the *British Nation*, *Miller* appealed.

C. A. 1876 MILLER'S CASE.

Cookson, Q.C., and *Millar*, for the Appellant.

Higgins, Q.C., and *Romer*, for the liquidators, were not called upon.

JAMES, L.J. :— Judgment, James, L.J.

This indorsement, in my opinion, constitutes a complete novation. The *European Society* say to the policy-holder, "We will be liable on your policy if you will pay the premiums to us," and the policy-holder agrees to this.

MELLISH, L.J. :— Mellish, L.J.

The contract is, that in consideration of *Miller's* paying his premiums to the *European Society* instead of to the *British Nation*, the *European Society* will pay the policy money. Then the non-payment of the premiums to the *British Nation* discharges the *British Nation*.

BAGGALLAY, J. A., concurred.

Solicitors: *Miller & Wiggins; Mercer & Mercer.*

CUNLIFFE *v.* BRANCKER.

C. A. 1876 M. R. *March* 23. C. A. *Aug.* 4.

[1876 C. 37.]

Will—Contingent Remainder—Estate of Trustees.

A testator devised a moiety of his real estate to *A.* and *B.* and their heirs, to the uses and upon and for the trusts and purposes thereinafter mentioned, namely, to the use of *A.* and *B.*, their executors, administrators, and assigns, for 120 years, if *S. C.*, the wife of *J. C.*, should so long live, and subject thereto, to the use of *J. C.* for life, with remainder to *A.* and *B.* and their heirs during his life, upon trust to preserve contingent remainders, with remainder to the use of all the children of *J. C.* and *S. C.* who should be living at the decease of the survivor of them, and the issue then living of such of the children as should be then dead, and the respective heirs and assigns of such children

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and issue as tenants in common (the issue taking only their parent's share), with divers remainders over. The will contained a power authorizing *A.* and *B.* and the survivor of them, and the heirs and assigns of such survivor, to "convey in exchange" any parts of the property, and to "convey upon partition" any of testator's undivided shares, with a direction that for those purposes it should be lawful for them by deed to revoke the uses, estates, trusts, and limitations of the property in shares so exchanged or conveyed in partition, and by the same or any other deed to "grant and convey" them to the requisite uses, "or for the purposes aforesaid to limit, appoint, or declare such use or uses," &c., as should be necessary. *J. C.* died in the lifetime of *S. C.*:—

Held (affirming the decision of the Master of the Rolls), that the intention of the testator clearly was to create a succession of legal limitations in settlement, and that the Court could not hold the legal fee to be in *A.* and *B.* merely because if it was not in them the contingent remainder to the children had in the events which had happened failed for want of an estate of freehold to support it.

Statement.

EDMUND LEIGH, by will, dated the 6th day of December, 1814, directed all his just debts, funeral expenses, and the charges of the probate of his will, and the legacy thereinafter bequeathed, to be paid out of his personal estate if the same should be sufficient for that purpose, but if not, then he charged his real estate with the payment of the deficiency; and the testator bequeathed to his servant *Jane Heaton* a legacy of £300, which, however, he revoked by a codicil. The testator then devised one undivided moiety of all and every his messuages, lands, tenements, rents, hereditaments, and real estate whatsoever and wheresoever, in precisely the same terms in which he afterwards disposed of the second moiety, except that the names of *Mary Ann Grundy* and her husband *Edmund Grundy* were substituted for those of *Sarah Cunliffe* and her husband *John Cunliffe*, and *vice versâ*. The testator then devised the other undivided moiety of and in all and every his said messuages, lands, tenements, rents, hereditaments, and real estate unto the said *Richard Prescott* and *Thomas Addison*, their heirs and assigns, to the several uses and upon the several trusts and to and for the several ends, intents, and purposes, and subject to the several provisoes thereinafter declared and contained of and concerning the same, (that was to say) to the use of the said *Richard Prescott* and *Thomas Addison*, their executors, administrators, and assigns, for the term of 120 years next after his decease, if the testators's niece, *Sarah Cunliffe*, should so long

live, but, nevertheless, upon the several trusts thereinafter mentioned of and concerning the same; and from and after the expiration or other sooner determination of the said term, and in the meantime subject thereto and to the trusts thereof, to the use of the said *John Cunliffe* during his life without impeachment of waste, with remainder to the use of the said *Richard Prescott* and *Thomas Addison* and their heirs during the life of the said *John Cunliffe*, upon trust to preserve the contingent uses and estates thereinafter limited from being defeated or destroyed, and from and immediately after the decease of the said *John Cunliffe* to the use of all and every or such one or more of the child or children of the said *Sarah Cunliffe* lawfully to be begotten who should be living at her decease, as they the said *John Cunliffe* and *Sarah* his wife during their joint lives by any deed or instrument in writing with or without power of revocation to be by them executed in manner therein mentioned, should from time to time appoint, and in default of such joint appointment, then as the survivor of them the said *John Cunliffe* and *Sarah* his wife should by any deed or instrument in writing with or without power of revocation to be executed in manner therein mentioned, or by his or her last will or codicil, appoint, give, or devise the same, and in default of such appointment, gift, or devise by the said *John Cunliffe* and *Sarah* his wife, or the survivor of them, to the use of all and every the child and children of the said *Sarah Cunliffe* lawfully to be begotten who should be living at the decease of the survivor of them the said *John Cunliffe* and *Sarah* his wife, and the issue of such of them as should be then dead leaving lawful issue then living, such issue respectively to have and take, and if more than one, equally amongst them, the part or share only which his, her, or their parent or parents respectively would have taken and been entitled to if living at the decease of the survivor of them the said *John Cunliffe* and *Sarah* his wife, and the several and respective heirs and assigns of such child, children, and issue for ever as tenants in common, and in case there should not be any child, or the issue of any child of the testator's said niece *Sarah Cunliffe* living at the decease of the survivor of them the said *John Cunliffe* and *Sarah* his wife, then to the use of the said *Richard Prescott* and *Thomas Addison*, their executors, administra-

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tors, and assigns, for the term of 130 years, to commence from the day of the decease of the survivor of them the said *John Cunliffe* and *Sarah* his wife, if the said *Mary Ann Grundy* should so long live, upon the trusts thereinafter mentioned concerning the same; and from and after the expiration or other sooner determination of the said term of 120 years, and in the meantime subject thereto and to the trusts thereof to the use of the said *Edmund Grundy* and his assigns during his life without impeachment of waste, with remainder to the use of the said *Richard Prescott* and *Thomas Addison*, and their heirs, during the life of the said *Edmund Grundy*, upon trust to preserve the contingent uses and estates thereinafter limited from being defeated or destroyed; and from and after the decease of the said *Edmund Grundy* to the use of all and every or such one or more of the child and children of the said *Mary Ann Grundy*, the wife of the said *Edmund Grundy*, who should be living at her decease, as they the said *Edmund Grundy* and *Mary Ann* his wife during their joint lives, by any deed or instrument in writing with or without power of revocation to be by them executed in manner therein mentioned, should appoint, and in default of such appointment, as the survivor of them the said *Edmund Grundy* and *Mary Ann* his wife should by any deed or instrument in writing with or without power of revocation to be executed in manner therein mentioned, or by will or codicil appoint, give, or devise the same; and in default of any appointment, gift, or devise by the said *Edmund Grundy* and *Mary Ann* his wife, or the survivor of them, to the use of all and every the child and children of the testator's said niece *Mary Ann Grundy* as should be living at the decease of the survivor of her and the said *Edmund Grundy*, and the issue of such of them as should be then dead leaving lawful issue then living, such issue respectively to have and take, and if more than one equally amongst them, the part or share only which his, her, or their parent or respective parents would have taken and been entitled to if living at the decease of the survivor of them the said *Edmund Grundy* and *Mary Ann* his wife, and the several and respective heirs and assigns of such child, children, and issue for ever as tenants in common; and in case there should not be any child or children, or the issue of any child or children of either of the testator's said nieces *Mary Ann Grundy* and *Sarah Cunliffe*

living at the decease of the survivor of them the said *Edmund Grundy*, *Mary Ann* his wife, *John Cunliffe*, and *Sarah* his wife, then the testator gave and devised all and singular his messuages, lands, tenements, rents, hereditaments, and real estate, unto and to the use of his kinsman *James Topping*, his heirs and assigns for ever; and the testator declared that the term of 120 years thereinbefore limited to the said *Richard Prescott* and *Thomas Addison*, their executors, administrators, and assigns, was so limited to them upon trust during the said term to pay the clear yearly rents and profits of the premises therein comprised unto the testator's niece *Sarah Cunliffe* and her assigns for her separate use; and that the term of 120 years, if his said niece *Mary Ann Grundy* should so long live, thereinbefore limited to the said *Richard Prescott* and *Thomas Addison*, their executors, administrators, and assigns, was so limited to them upon trust during the said term to pay the clear yearly rents, issues, and profits of the premises therein comprised unto the testator's said niece *Mary Ann Grundy* and her assigns for her separate use.

The will contained a clause authorizing the trustees and the survivor of them, and the heirs and assigns of such survivor, to "convey in exchange" for other hereditaments all or any parts of the devised property "and the inheritance thereof in fee simple, and also in like manner to convey in fee simple upon partition" any of his undivided shares in property, and for those purposes he declared that it should be lawful for his trustees and the survivor of them, and the heirs and assigns of such survivor, by deed "to revoke, determine, and make void all and every the uses, estates, trusts, and limitations hereinbefore limited, created, expressed, and contained of and concerning the hereditaments so to be exchanged or conveyed on partition," and by the same or any other deed, "to grant and convey the hereditaments and premises, the uses whereof shall be so revoked" to such person and to such uses as should be necessary, "or for the purposes aforesaid, to limit, appoint, or declare such use or uses, estate or estates, trust or trusts, of and concerning the same hereditaments and premises as shall be necessary or expedient." There was a proviso that all such exchanges and partition should be made with the consent, in writing, of the person or persons for the time being entitled to the

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Statement.

rents and profits of the hereditaments to be conveyed in exchange or on partition, notwithstanding the coverture of any of them; and when any should be under the age of twenty-one years, then with the like consent of his, her, or their guardian or guardians.

There followed a clause that it should be lawful for the trustees, or the survivor of them, or the heirs or assigns of such survivor, with such consent as thereinbefore mentioned, "to demise or lease" all or any parts of the demised property for any term not exceeding seven years, at such rent or rents as they or he should think proper, without fine or premium, "such rent or rents to go along with and be incident to the immediate reversion of the premises so to be demised or leased." There were similar powers of granting mining and building leases.

It was further declared that it should be lawful for the trustees and the survivor of them, and the heirs and assigns of such survivor, when and as they or he should think fit, with such consent and approbation as thereinbefore mentioned, to fell timber and apply the proceeds as therein mentioned.

The testator died in June, 1817, leaving his two nieces his co-heiresses-at-law.

Mary Ann Grundy died in 1848, and her husband, *Edmund Grundy*, in 1855, and no question arose as to the moiety devised to the *Grundy* family.

John Cunliffe died in 1871, leaving his wife, *Sarah Cunliffe*, surviving. She died on the 9th of September, 1873, leaving several children; and the question then arose whether there was not an intestacy as to her moiety of the estates, on the ground that the limitation to her children living at her death was a contingent remainder, which, after the death of *John Cunliffe*, had no particular estate of freehold to support it. This action was brought by her children to have the question decided. No arrangement between the parties interested was possible, as the interest of Mrs. *Grundy* under an intestacy was vested in trustees upon trusts under which persons yet unborn might become entitled.

The case came on for hearing before the Master of the Rolls on the 23rd of March, 1876.

Cotton, Q.C., and *Finch*, for the Plaintiffs.

Joshua Williams, Q.C., and *North*, for the Defendants, were not called upon.

JESSEL, M.R.:—

Well, Mr. *Williams*, I am sorry to say I shall not call upon you. I would certainly if I could. This is a case in which, according to my view, the intention of the testator fails on account of a feudal rule of law which, in my humble judgment, ought to have been abolished long ago. I mean the rule of law requiring that, in order to support a contingent remainder, there must be an estate of freehold in existence at the time the contingent remainder becomes vested, so that if until the time of the determination or cesser of the prior estates of freehold the remainder has not vested, it fails in spite of the intention of the settlor or testator. This has nothing to do with the intention. It always disappoints the intention, because every settlor, or testator, intends the contingent remainder to take effect. This is an arbitrary feudal rule, one of the legacies of the Middle Ages which has come down to our times, and which, not having been interfered with by the Legislature, I cannot interfere with. All I have to do is to construe the instrument fairly, find out what it means, and then to apply the established rules of law to the instrument, and see what the effect will be. I am sorry to say—for it disappoints in this case the intention of the testator—that I cannot bring myself to doubt what the meaning of this will is. The only point in contest is whether the legal fee in an undivided moiety of freehold land is or is not vested in certain trustees. Now, apart from the rule of law about the failure of contingent remainders, I think I may venture to say that no human being who understood anything about real property law would entertain a a doubt about the meaning of this will. How far Judges may be, or ought to be, able to defeat a rule of law of which they disapprove, I cannot say. I think it is the duty of a Judge not to allow himself to be so influenced, but to construe the instrument in a proper way, to arrive at its meaning independently of the results, and then apply the law. This has been laid down over and over again with regard to another rule of law—the rule against remoteness or perpetuity—but I do not see that, because

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in the opinion of the Judge the one rule of law is reasonable and the other unreasonable, the rules of construction are to be altered. Here is a gift of an undivided moiety of freehold land to *Prescott* and *Addison*, their heirs and assigns, to the several uses and upon the several trusts, &c., thereinafter declared, that is to say, &c. That form of gift shews that the testator intended *bonâ fide* a gift to uses, not that the *Statute of Uses* applies to wills, as we know; but it is an indication of intention that the legal estate is not to pass under the first gift, but to pass under the uses, otherwise all these uses will come to nothing—"to the use of the same trustees, *Prescott* and *Addison*, their executors, administrators, and assigns, for the term of 120 years after my decease, if my niece *Sarah Cunliffe* shall so long live." Can there be a doubt, if it stood alone, that the legal estate of 120 years is vested in the trustees. The contrary construction would lead to this—that the term is of no use—the trustees would take nothing under the limitation of the term, as they had the fee already. This limitation would be simply absurd. Then it goes on, "But nevertheless upon the several trusts herein mentioned"—the trusts for the separate use of the lady—"and from and after the end, expiration, or other sooner determination of the said term of 120 years, and in the meantime subject thereto and to the trusts thereof, to the use of *John Cunliffe* and his assigns for and during the term of his natural life." Here, again, the word is "use," following the devise to them and their heirs, and of course it would give him the legal estate. It must be intended to do so. But it does not stop there, because the testator goes on, "and from and after the determination of that estate by any means in his lifetime to the use of the trustees and their heirs, for and during the natural life of *John Cunliffe*, upon trust to preserve contingent uses and estates hereinbefore limited from being defeated or destroyed." That is the common form, and shews clearly that *John Cunliffe* takes the legal estate; for you do not want a trust during his life to preserve contingent remainders, except to prevent the consequence of his forfeiture. That is plain, and though it is possible you may find a context so clear as to cut down even these words—for it is difficult to say what plain words may not be controlled—you certainly must find a context very plain indeed, and altogether inconsistent, to cut

down such a plain limitation. To my mind, having some knowledge of the law of real property, the form of limitation to *John Cunliffe*, followed by the form of limitation to trustees to preserve contingent remainders during his life, shews clearly that *John Cunliffe* takes a legal estate for life. Then it goes on. "And from and immediately after the decease of the said *John Cunliffe*, to the use and behoof of all and every or such one or more of the child or children of *Sarah Cunliffe* lawfully to be begotten who shall be living at her decease." Now as to that, it is in such proportions, manner, and form, &c., as the survivors or the survivor shall appoint. What does that mean? No children are to take except children of *Sarah* who should be living at her decease, and the power only enables the donees to say which of the children then living shall take and in what shares. If it stood there, would there be any doubt in the world that the children who survived *Sarah Cunliffe*, not being ascertainable till her death, take a contingent remainder? You cannot tell till her death what children will survive. It is quite true that the testator probably never heard of this rule of law, but I think his conveyancer did who drew the will, for it is a will drawn by a lawyer, and the conveyancer made a mistake, he overlooked the fact that if *John Cunliffe* died before his wife there would be no freehold to support the contingent remainders. The testator himself may never have heard of the law, and it is quite true he intended the children of *Sarah Cunliffe* who survived her to take. You do not want to take into consideration the effect of the power of appointment being given to the survivor, who may be *Sarah Cunliffe*, in order to make that intention plain. It was plain enough before. But it is said, inasmuch as *Sarah* may survive, and may make a will and appoint, it is impossible the will can take effect if I read it so. It is not impossible through any default or defect of expression of intention, but through the fault of the rule of law, and the argument is really used in this way: Inasmuch as the limitations the testator intended to take effect cannot take effect unless you give an estate in fee to the trustees so as to get rid of the rule of law, therefore you must infer an estate in fee to the trustees. How far is this to go? Are we to say that in every case where trustees are named for a different purpose, or

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without any purpose at all, they are to take the fee, if such a construction will preserve contingent remainders? Then, unluckily, in default of appointment the estate is given substantially in the same way to the use of all the children of *Sarah Cunliffe* who should be living at the decease of the survivor of the husband and wife and the children of such of them as should be then dead, which, of course, is also contingent till the death of the wife.

Then it was said there were some other portions of the will which would enable me to say that the trustees were intended to take the legal fee in spite of the words limiting their estate in the clear way I have referred to. I confess I should have been very glad if I could have brought my mind to that conclusion, because, construing the will as I feel bound to do, I certainly disappoint the intention. The first was a power to convey. "And I do hereby fully authorize and empower them or him at any time or times hereafter to convey in exchange." The word "convey" by itself does not shew much; it is a word of general meaning, denoting any act by which real property is passed from one person to another —a rather more modern term, I believe, than "assure," but having the same meaning. Then it goes on afterwards: "And for the intents and purposes aforesaid it shall and may be lawful for the trustees or trustee, by any deed or deeds, &c., to revoke, determine, and make void all and every the uses, &c., hereinbefore limited of the hereditaments so to be exchanged or conveyed in partition, or any part thereof." Nothing can be clearer. That is a power, and a power to exchange or partition under the *Statute of Uses*. It is to convey by way of revocation and appointment. On that, therefore, I think nothing available for the Plaintiffs can fairly be argued. Then there is a proviso that all the exchanges and partitions under this power of exchange or partition "be made with the consent in writing of the person or persons for the time being entitled to the rents and profits of the hereditaments to be conveyed in exchange or on partition, notwithstanding the coverture of any of them. And when any shall be under the age of twenty-one years, then with the like consent of his, her, or their guardian or guardians." Then the next power is, "Provided always, and I declare my will and mind to be, that it shall and may be lawful for the trustees, &c., with such consent as aforesaid, to demise or

lease all or any of my messuages, lands, tenements, &c., for any term of years not exceeding seven, to commence in possession, or at such other times as they shall think proper, so that there be reserved and made payable upon every such lease during the continuance thereof such yearly rent as they shall think reasonable, such rent and rents to go along with and incident to the immediate reversion of the premises so to be demised or leased." It is quite plain that it is a common power of leasing. There is no necessity in the world to give them anything else but a power. The next power is that it shall be lawful for the trustees with such consent and approbation as aforesaid to demise or lease all or any of the mines, quarries, and drifts of coal—a very large mining power; and there is afterwards a power of building. Again, the rents are to be incident to and go along with the reversion, and there are provisions for what should be contained in the leases. It appears to me it is a power, and nothing but a power. It is a power in words, it is a power in substance, and it is a power in intention. Then the next power is: "And I do hereby declare my will and mind to be that it shall be lawful for the trustees, &c., as they shall think fit, with such consent and approbation as aforesaid, to fell, cut down, sell, cart, and carry away such timber and trees growing and to grow upon my said lands, &c., as they or he shall think fit, and to pay, apply, and dispose of the moneys to arise from the sale or sales of such timber and trees to such person or persons as shall then be entitled to the rents, issues, and profits of the land whereon the timber and trees so from time to time to be felled shall respectively be standing or growing, and in such parts, shares, and proportions as such person or persons shall be respectively entitled to such rents, issues, and profits." It is clear they do not want any estate for this. Then the last power is this: "And that each of them shall, by and out of the trust moneys or rents which shall come to his and their hands, retain to and reimburse himself and themselves, and pay and allow to his co-trustees all such costs, charges, and expenses as he or they shall or may pay, bear, sustain, or be put to about the execution of the trusts in this my will contained." That was said to shew they had a fee, but I see no reason for it. It is a power to reimburse themselves out of trust-moneys that come to their hands. They get trust-moneys if they cut

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timber or if they received the rents under the term of 120 years during the life of the niece. They had, therefore, plenty of ways of getting trust-moneys without imputing an intention to the testator to give them a fee.

Under these circumstances, though I regret it, the testator's intention appears to be plainly to have been, not to vest in fee in the trustees, but to limit legal estates in settlement, and I am compelled by the artificial rule of law to say that I must disappoint his intention by stating that the contingent remainders fail for want of a sufficient estate to support them.

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The Plaintiffs appealed from this decision, and the appeal came on for hearing on the 14th of July, 1876.

Argument.

Cotton, Q.C., and *Finch*, for the Appellants:—

The question is, whether the trustees took the fee so as to preserve the contingent remainders. It has been laid down that the existence of contingent remainders, which, if the limitations are legal, are left unsupported, is a reason for holding trustees to take the fee: *Doe* v. *Willan* (1); *Houston* v. *Hughes* (2). The creation of the power here shews that the existence of contingent limitations expectant on the death of *Sarah*, if she survived her husband, was in the contemplation of the testator, but they could not take effect without an estate to preserve them. The cases of *Rackham* v. *Siddall* (3), *Blagrave* v. *Blagrave* (4), and *Doe* v. *Hicks* (5), support the contention that the fee is in the trustees. According to the view of the Respondents, there was an intestacy in the event of the wife surviving the husband. There is, in the first instance, a gift to trustees sufficient to give them a fee, and the Court will not, without express words, take it out of them, where the effect of so doing would be to defeat the testator's intention. The devise is to them "for the intents and purposes hereinafter declared." If they take the fee all the dispositions of the will can take effect. Otherwise not. The power to grant

(1) 2 B. & A. 84.
(2) 6 B. & C. 403, 419.
(3) 1 Mac. & G. 607.
(4) 4 Ex. 550.
(5) 7 T. R. 433.

leases for any term of years is in favour of their having the fee: *Doe* v. *Willan* (1); *Watson* v. *Pearson* (2).

Joshua Williams, Q.C., and *North*, *contrà*:—

It is important that the landmarks of the law should not be removed for the purpose of obviating hardship in particular cases. *Doe* v. *Morgan* (3) is very like the present case as regards the form of limitation, and shews that this is a contingent remainder which will fail for want of a freehold to support it. It makes no difference whether a contingent remainder is created by way of devise, use, or otherwise: *Festing* v. *Allen* (4). This will is formally and regularly drawn as a will intended to operate under the *Statute of Uses*, and to confer legal estates on the successive takers. This was the intention, but there is a slip in framing the limitations. Had it not been for that slip it never would have entered the mind of any one to contend that the trustees took the fee. There is a wide difference between a case like this and those cited for the Appellants, which were on informal wills. Here uses and trusts follow each other in a regular way, and the powers are such as would be given in a strict settlement will. The power of sale and exchange expressly authorizes the trustees to revoke the uses, which shews that they were not to effectuate the transaction by a conveyance of the legal estate which was in them. The language of the leasing power tends the same way. The rent is to be incident to the immediate reversion, shewing that the lessor was not to take it. All the duties imposed on the trustees are given in the form of powers operating under the *Statute of Uses*. In *Barker* v. *Greenwood* (5) *Parke*, B., says that no case has been referred to where the preservation of contingent remainders has alone been held a sufficient reason for holding trustees to take the fee. *Wms. Saund.* (6) is to the same effect. The charge of debts will not give the trustees the fee: *Kenrick* v. *Lord William Beauclerk* (7). *Heardson* v. *Williamson* (8) is against the Appellants. *Venables* v.

(1) 2 B. & A. 84.
(2) 2 Ex. 581.
(3) 3 T. R. 763.
(4) 12 M. & W. 279.
(5) 4 M. & W. 421, 431.
(6) Vol. ii. p. 11, b.
(7) 3 B. & P. 175.
(8) 1 Keen, 33.

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Morris (1) is distinguishable, there being a general trust for preserving contingent remainders: *Jarman* on Wills (2). The remark in *Houston* v. *Hughes* (3) was only an *obiter dictum*. The employment of the word "use" shews that the *Statute of Uses* was intended to operate: *Co. Litt.* (4); *Doe* v. *Willan* (5). The decision in *Festing* v. *Allen* (6) has been repeatedly followed. The last case is *Brackenbury* v. *Gibbons* (7). The *Statute of Uses* applies to wills: *Sugden* on Powers (8); therefore to shew that the devisees to uses are more than conduit-pipes, you must shew an intention that they are to have an estate. The Court cannot, in order to effectuate a presumable intention not to be discovered in the will, adopt a construction which will prevent express limitations from taking effect: *Curtis* v. *Price* (9).

[MELLISH, L.J.:—Surely it is to be discovered in the will that the testator intended the limitations to take effect if his wife survived.]

He, no doubt, through mistake, thought they would take effect: *Doe* v. *Hicks* (10), which is cited against us, is an authority for us; it shews that a gift to trustees and their heirs will not give them a legal fee when there is no occasion for them to have it. Many of the powers in the will are made absurd if the fee is in the trustees, and the limitation of a term to them is utterly inconsistent with their having the fee: *Beaumont* v. *Marquis of Salisbury* (11); *Lewis* v. *Rees* (12); *Cooper* v. *Kynock* (13).

Cotton, in reply:—

Whether the limitations of a will are equitable limitations, or are operated upon by the *Statute of Uses*, is a question of intention appearing on the will: *Jarman* on Wills. The question then is, whether there is not apparent, on the face of this will, an intention which requires the legal estate to be in the trustees. In

(1) 7 T. R. 342, 438.
(2) 3rd Ed. vol. ii. p. 293.
(3) 6 B. & C. 419.
(4) Page 271 b, n.
(5) 2 B. & A. 84.
(6) 12 M. & W. 279.
(7) 2 Ch. D. 417.
(8) 8th Ed. p. 146.
(9) 12 Ves. 89.
(10) 7 T. R. 433.
(11) 19 Beav. 198.
(12) 3 K. & J. 132, 148.
(13) Law Rep. 7 Ch. 398.

Doe v. *Morgan* (1) and *Brackenbury* v. *Gibbons* (2) there was no devise at all to trustees. The ultimate limitation in this will is "unto and to the use," shewing that it was intended to limit over the estate given to the trustees. *Festing* v. *Allen* (3) has never been treated as an authority on the quantity of estate taken by trustees. The only point considered was whether the remainders were contingent. The Court will not ignore the devise to the trustees: *Sugden* on Powers (4).

Aug. 4. JAMES, L.J., after reading the material parts of the will, continued:— Judgment, C. A. James, L.J.

It cannot be doubted (and it has not even been argued otherwise) that the limitations, according to their ordinary natural construction, are legal limitations. And it would be impossible for us to make them equitable instead of legal limitations merely because in the events which have happened the contingent remainders are left without a sufficient freehold estate to support them. The rule of law was, and strange to say still is, that a contingent remainder fails unless there be a preceding freehold estate continuing to exist up to the happening of the contingency on which the remainder is to vest. Contingent remainders have been protected against the destruction of the preceding particular estate, but have been still left to die with the death of such estate through an inherent defect in their original constitution.

That is the rule of law, and we cannot help it. We cannot alter the construction of the instrument to avoid or evade that rule. We must construe the words just as if there were no such rule of law, and then, having thus ascertained the construction, apply the rules of law to the instrument so construed.

I have said that if the devise, the series of limitations I have read, stood alone, no lawyer could doubt that these limitations were limitations of legal estates, or would suppose that it was intended by the instrument that the trustees should have no term of years, should have no estate *pur autre vie* to support the

(1) 3 T. R. 763.
(2) 2 Ch. D. 417.
(3) 12 M. & W. 279.
(4) 8th Ed. p. 811, par. 79; p. 813, par. 82.

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contingent remainders, but should have the entire legal fee in them.

But it was contended, and truly, that, notwithstanding these apparently clear indications of intention that the successive beneficial devisees should have the legal estate in them, the rest of the will might still shew so clearly a contrary intention that the fee should be in the trustees, that there were purposes to be effected, trusts to be executed, duties to be performed so requiring them to have the fee, that we should reject the formal limitations as the mere blundering of the draftsman, just as if they were, as they often are, found in the wills of testators who had themselves nothing but an equitable estate or a long term of years to deal with.

The indications of such intention are, it is said, to be found in the subsequent powers and provisions of the will. The material subsequent powers and provisions are those providing for sale and re-purchase, for leasing and for cutting timber. The first, so far from shewing any such intention, is, in truth, pregnant with evidence to the contrary. The sale is not to be made by a conveyance out of the legal fee in the trustees, but by revoking the old uses and limiting new uses to effect the sale in terms the same as the ordinary machinery of a similar settlement by deed. And the new estates to be purchased are to be taken by a conveyance to the existing uses, and a conveyance would naturally, and, as a matter of course, limit the estate to releasees to uses, transcribing the very words of the will from the power. The leasing power is the ordinary leasing power which is found generally in settlements and wills, and no more requires that there should be the fee in the donee of the power than the leasing power to a tenant for life enlarges his estate to a fee. The lease would take effect to all intents and purposes legally and equitably under the power, as a mere power, as fully as if it were derived from a fee simple in the persons leasing.

The power of cutting and selling timber, again, would not be in the slightest degree embarrassed or prejudiced by the want of an estate in the persons exercising it. Its legal operation would be just the same as that of a power to executors (not being devisees of the realty) to cut and sell timber in aid of the personal estate.

The power to sell timber, which is part of the land, certainly no more requires a fee simple estate, or any other estate, than the power to sell the land with the timber on it, which power has already been dealt with. The truth is that these indications of an intention to leave the fee simple in the devisees to uses, are so slight, so shadowy, that no one would have dreamt of finding such intention in them if they had not been found in the same instrument with a blundering, inaccurate, and insufficient limitation to preserve the contingent remainders. But I repeat that we must construe these parts of the will as we were obliged to construe the limitations themselves, just as if the limitation to preserve had been ample and sufficient—just as if no such limitation were by the rules of law necessary.

Considerable stress was laid in the argument on two cases, *Doe* v. *Willan* (1) and *Houston* v. *Hughes* (2), in which Mr. Justice *Bayley* considered that the want of any estate to preserve the contingent limitations afforded an argument that the fee was intended to remain in the trustees. It is not necessary to inquire whether those *dicta* will bear examination, whether instead of making the legal consequences depend on the construction they are not making the construction depend on the legal consequences. Nobody intends that the contingent remainders devised by his will should fail, and it is by a rule of law, independent of and paramount to his intentions, that they do in the result fail. It is unnecessary to enter upon that inquiry, for it is impossible to apply those *dicta* to this case. In the absence of any contrary or inconsistent intention expressed in the instrument, it may be convenient to hold that if there are words sufficient to give the fee to the devisees in trust, the same shall be held to remain in them if there be any intention in the will which would be better served by its so remaining. But here the express limitation of the term of years and of the estate to preserve contingent remainders are absolutely inconsistent with an intention that the fee should remain in them, so that there should be no such term and no such estate ever to come into existence. It is said, indeed, that Lord *Cottenham*, in *Rackham* v. *Siddall* (3), held that a limitation of a term to trustees in the par-

(1) 2 B. & A. 84. (2) 6 B. & C. 420.
(3) 1 Mac. & G. 607.

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ticular will before him did not prevent the trustees from having the legal estate in fee. But in that case the legal estate had been in the plainest words limited to them in fee, and he put it expressly on the ground that there were two plainly inconsistent devises, and he chose the first.

To apply that case, or the *dicta* of Mr. Justice *Bayley*, to the case before us, we should have to hold generally that wherever there is a devise to a man and his heirs to uses, and there is in the will a contingent remainder unprotected, the legal fee remains in him, making every limitation equitable in order to give protection to such remainder. We could not and would not so hold, if we thought the rules of law as to particular estates and contingent remainders reasonable and beneficial, and so long as the Legislature retains them we are bound to act as if they were most reasonable and beneficial. We could not so hold without expressly overruling the case of *Festing* v. *Allen* (1), in which the point was apparently thought unarguable by most of the counsel engaged, in which it was argued by one counsel and was put aside as not worthy of serious consideration by the Judges at common law and in equity; and the case of *Festing* v. *Allen* has been from the time it was pronounced regarded as one of the leading authorities in real property law.

We must affirm the judgment of the Master of the Rolls.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors: *Gregory, Rowcliffes, & Rawle; W. W. Wynne.*

(1) 12 M. & W. 279; 5 Hare, 573.

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C. A.
1875
V.-C. M.
July 14.
C. A.
Nov. 17.

Debentures — Creditors — Vendor — Priority — Liquidator's Charges — Costs of Realization — Costs of Preservation — Leaseholds.

Under agreements made between a company and *G.*, from whom the company had previously bought its works, *G.* was to advance money to the company, and all moneys due to the company were to be received by *G.*, who was to apply these moneys and also the money to be advanced by him in paying wages and salaries and other outgoings for the business of the company, and subject thereto was to repay himself. An order was made for winding up the company, under which *G.* and the liquidators, with the sanction of the Vice-Chancellor, made an agreement for an advance by *G.* of further sums on similar terms. *G.* advanced money for the payment of rent, rates, wages, and outgoings: a large balance remained due to him. The leasehold property, machinery, and plant of the company were sold by the liquidators:—

Held, varying the order of *Malins*, V.C., that the costs of carrying on the business were not payable out of the mortgaged property in priority to debentures as costs of preservation, and that (subject to the costs of realizing the property) the fund belonged to the debenture holders in priority to the claims of *G.* or the liquidators for the costs so incurred.

Statement.

HENRY GRISSELL, previously to 1864, carried on the business of an iron manufacturer, and in that year a company was formed for the purchase of his business. The company was called the *Regent's Canal Ironworks Company, Limited.* The capital was to be £250,000 in £20 shares, and by the articles of association the directors might borrow any sum or sums of money on mortgage, or on bonds, debentures, or any other security whatsoever, at such rate of interest and upon such terms and with such provisions in favour of the lenders as the directors might think proper. Under an agreement dated the 4th of July, 1864, the company agreed to purchase the works, stock-in-trade, and goodwill of the business for £70,000, partly in cash, partly in shares, of which all but £15,000 was paid.

At a meeting of the directors held on the 21st of March, 1865, it was resolved that mortgage debentures of the company to the extent of £25,000 should be issued, and accordingly debentures to the amount of £15,000 were issued to six persons, and debentures

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to the amount of £10,000 were issued to trustees for the company, and were afterwards by them assigned to the *International Financial Society* as security for money advanced. Each debenture was in the form of a deed-poll, by which the company declared itself bound to pay to the person therein named the sum of £250 and interest; and for the due payment thereof the company charged all the funds, property, and effects of what nature or kind soever which the company held or possessed, or should hold or be possessed of; and the company agreed to hold 1250 unissued shares for further security.

By articles of agreement dated the 1st of June, 1866, and made between the company and *Grissell*, it was agreed that *Grissell* should advance for the use of the company £4000 for a period of four calendar months, he deducting thereout £100 for interest. If the money was not repaid at the end of the four months it was to bear interest at £10 per cent. During the four months, unless *Grissell* should give the notice thereinafter mentioned, the business should be carried on under his direction. "All moneys due or to become due in respect of works executed by the company, whether already completed or now in progress, or new works to be undertaken by the company during the continuance of this security, shall be received by the said *H. Grissell*, his executors or administrators, and be paid to the credit of the manager's account with the company's bankers, and no one but the said *H. Grissell*, his executors or administrators, shall be entitled to draw on such account." The security was to be subject to the application of certain payments to meet certain acceptances, but subject thereto, *Grissell* was to apply the sums to be so received by him, and also the sums to be advanced by him as aforesaid, in taking up acceptances of the company and in paying the wages and salaries of the servants of the company, and in making such other payments as might from time to time become due from the company in carrying on the business. When all the moneys had been so paid, *Grissell* was, out of the moneys so to be received, to pay himself the sums advanced by him as aforesaid, and interest as aforesaid. The company might at any time, on payment to *Grissell* of what was due or secured to him, put an end to this agreement.

Similar agreements, dated the 3rd of July, 1866, and the 5th of September, 1866, as to further advances, were made between the company and *Grissell*. *Grissell* made the advances, and there was a balance due to him on them. He had also acted as managing director.

On the 17th of December, 1866, the company resolved to wind up voluntarily, and on the 21st of December, 1866, the voluntary winding-up was directed to be continued under the supervision of the Court.

On the 22nd of December, 1866, *Grissell* and Mr. *Judkins*, one of the liquidators, were summoned to attend before the Vice-Chancellor *Malins* in Chambers, and by the direction of the Judge, which was given for the purpose of obviating the serious loss and inconvenience which would result from the sudden and complete stoppage of the works, which was otherwise inevitable, an agreement was made between the company and *Grissell*, by which *Grissell* was requested to advance the money for payment of wages and other outgoings due that day. The works were to be kept open by *Grissell*, and continued so long as in the liquidators' discretion should appear desirable, it being understood that the workmen and the necessary outgoings up to the time of any stoppage of the works should be paid by funds to be provided by *Grissell*, in respect of which he should have the same security as for the advances made under the former agreements. He was also to make advances for the purchase of materials, with corresponding rights. He should be undisturbed in the collection of debts due to the company to an extent adequate to his complete reimbursement in respect of the above-mentioned advances, he undertaking to pay all moneys collected by him to a separate account, and only to draw upon that account sufficiently for his reimbursement. The advances were to bear 5 per cent. interest.

In pursuance of this agreement *Grissell* found all the money (beyond the amounts from time to time received by him) to pay the wages and prevent the closing of the works; he also paid rent, taxes, insurance, and other outgoings, in default of payment of which the leases would be liable to forfeiture.

Several orders were made in the winding-up expressed to be without prejudice to the claims of *Grissell* or the debenture

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holders; and on the 28th of January, 1871, an order was made for an account, 1, of what was due to *Grissell* as unpaid vendor; 2, of the payments made by him for rent, rates, and taxes. And it was ordered that the liquidators should sell and realize the assets of the company, and, after payment of the costs of all parties appearing, the liquidators were out of the proceeds of such sales to pay to *Grissell* the amount found due to him as unpaid vendor, and the residue was to be paid into a bank; the order being without prejudice to the question whether anything was due to him on the second account, and how and in what priority, and without prejudice to the claims of the liquidators for costs and remuneration. This order was varied on appeal, and was made without prejudice to any claim of the liquidators in respect of costs or services rendered in or about the preservation or realization of the property included in the securities of the debenture holders of the company.

The property was accordingly sold, and out of it the balance of the purchase-money had been paid to *Grissell*.

The money now in dispute represented exclusively the proceeds of the sale of the leaseholds and machinery and plant (all of which were comprised in the security of the debenture holders), and no part had arisen from the proceeds of carrying on the business.

In order to ascertain the principles on which the accounts were to be taken, a statement was made and settled stating as above mentioned; also that the points of contention were: 1. *Grissell* claimed first any costs due to him as unpaid vendor or mortgagee, and then the sums expended by him in and about the protection and preservation of the company's property in priority to all other claims. 2. That he was entitled to receive and retain all moneys earned by the company before the 22nd of December, 1866, in reduction of the amounts due to him under his several agreements, in priority to any claims except as to No. 1. 3. That he was entitled to receive the moneys earned by carrying on the business after the 22nd of December, 1866, and to apply them in reduction of the amount due to him for money expended for the purpose of the said business. 4. That he was entitled to be paid out of the general assets of the company in priority to any other claims.

Statement.

The *International Financial Society* contended that *Grissell* was not entitled to be paid unless the proceeds of the sales should prove more than sufficient to satisfy the claims of the debenture holders. 2. That the liquidators were not entitled out of the funds in hand to any costs incurred or remuneration for services rendered in respect of the preservation of the property, or to any other costs than the expenses incurred in and about the realization of the property. 4. That as to sums expended by *Grissell* in and about the protection and preservation of the property, he must carry them and the other outgoings paid by him to the debit side of his account and appropriate them in payment of the items on the credit side. 6. That *Grissell* was not entitled to any costs except those of an unpaid vendor.

The other debenture holders claimed a general priority, subject only to *Grissell's* charges as unpaid vendor.

The liquidators claimed a permanent lien upon all the assets of the company in respect of their remuneration for services, and for their costs, charges, and expenses of and relating to the winding-up.

Upon this statement the questions were argued before the Vice-Chancellor *Malins* on the 14th of July, 1875.

The same counsel appeared for the different parties, and arguments were used similar to those used on the appeal.

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MALINS, V.C., after stating the facts of the case, said that the contract of the 1st of June, 1866, certainly contained nothing unfair or unreasonable. The company was in difficulties; they wanted money, and nothing could be more fair or proper than that the person who advanced the money to enable them to complete their contracts should not stand by and allow the proceeds of those contracts to go into the general assets of the company, but should, in the first place, out of the proceeds of those contracts, be repaid all sums of money which he had advanced for their completion. That was the plain and distinct meaning of the contract. His Honour then stated the proceedings in the liquidation: that there was a representation made to him that there were no means of paying the workmen;' that one of the liquidators

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and *Grissell*, at his Honour's request, attended before him, and it was then arranged that *Grissell* should advance the money in order that the men might be paid. It was for the advantage of all parties, whether debenture holders or ordinary creditors, that the works should be carried on, which could not be done without assistance. It was an arrangement of the Court, and whatever was agreed to must be fulfilled with the utmost punctuality, because the honour of the Court was involved in seeing that *Grissell* had all his rights under that contract. His Honour must regard all the parties as before him on that occasion, although the debenture holders did not actually appear. Under the agreement the liquidators could at any time have stopped the works, and *Grissell* would be obliged to stop them. His Honour then continued:—

Confining my attention for the moment to the effect of the document of the 22nd of December, what rights does it give *Grissell*? My understanding undoubtedly is, that whatever money *Grissell* on and after that day advanced for the benefit of the company, whether in the payment of wages, rent, taxes, or for materials, to get labour to complete the existing contracts for the benefit of the company, he was to be reimbursed, not only out of the money received from the contracts which he advanced money to complete, but out of all property of the company, whatever that might be. Was there in this any injustice or hardship to the debenture holders or any one else? If this had not been done the whole thing would have gone to rack and ruin. It is all very well to be wise after the event, but the opinion at that time was that it was for the interest of all to carry on the works. The latter end of 1866 was a period of great difficulty in all commercial concerns; the world was never in a greater state of confusion as to financial affairs than it was in the latter part of that year, and probably the speculation of all parties, the debenture holders included, was that if they could hold on for a time they might sell to some other company or to some advantage, and that it was better for all parties to have the money advanced and to go on and complete the contracts, instead of being made liable for breaches of contract. And although the order does not in terms give *Grissell* a right to resort to

any other property (I think it rather defectively worded in that respect) than the receipts of the company, yet in my opinion the spirit and object of the order undoubtedly was an indemnity to him out of every part of the property. Therefore I am of opinion that all advances made by him under that order must be repaid out of every part of the property which can be found.

Entertaining that view under the order of the 22nd of December, the next question is, What is the effect of the contract between *Grissell* and the company made on the 1st of June, 1866, with which the Court had nothing to do? There, it appears to me, the company have deliberately agreed that *Grissell* should be reimbursed all moneys advanced by him up to £4000 out of the proceeds of the contracts. There is no agreement there that the general property of the company shall be liable, and therefore I am unable to say that for the payment of the indemnity of this deed he can resort to anything more than is specifically mentioned in the contract, and I understand that it is not claimed. If money has been partly earned and materials supplied before the 22nd of December, and that work has continued after, my opinion is that Mr. *Grissell* is entitled to receive the proceeds, and, in the first place, to apply those proceeds in repayment of all he has advanced under the order of the Court, and what remains after that he is entitled to apply in repayment of whatever he has advanced under the contract of the 1st of June.

After some discussion as to the form of the order, His Honour proceeded to say:—There is one other point, and that is as to the priority of the liquidators' claims for remuneration and expenses over *Grissell's* claim. No doubt under the 144th section of the Act of 1862 a liquidator is to have priority for all his costs, charges, and expenses. The words are very explicit, and have always been acted upon; but here one of the liquidators came before me, and virtually renounced that right, deliberately giving priority to *Grissell*. If he had intended to have priority, he should have reserved it. I must regard him as having renounced his strict rights, because in common with all others he thought it better to have the money provided for the works than suddenly to stop them. Therefore I cannot allow the claims of the liquidators or

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of the debenture holders, or any claim whatever, to stand in the way of *Grissell's* rights under this express order of the Court, and any such rights ought to have been reserved in terms.

The order made was that *Grissell* was entitled to be paid any costs due to him as unpaid vendor or mortgagee in priority to all other claims. That under the agreements of the 1st of June, 1866, the 3rd of July, 1866, and the 5th of September, 1866, *Grissell* was entitled to retain the moneys paid for work done wholly or in part by the company before the 22nd day of December, 1866, whether received before or after that date, in reduction of the amounts due to him under the several agreements; and if the money paid for work not finished before the 22nd of December, 1866, was insufficient to recoup the expenditure thereon, the amount was to be apportioned between the expenditure before and expenditure after the 22nd of December, 1866. That, under the agreement of the 22nd of December, 1866, *Grissell* was entitled to a first charge on all the property of the company, including the proceeds of sale of the leasehold premises, for all moneys advanced by him, for whatever purpose, on the faith of that agreement, and for all moneys paid by him for rents, rates, taxes, premiums of insurance, or otherwise, in or about the protection and preservation of the company's leasehold premises, plant, machinery, stock, and effects, and interest thereon. That subject to the costs of *Grissell* as unpaid vendor the costs of *Grissell* and of the liquidators incurred in realizing any property of the company were to be paid out of the proceeds realized in priority to all other claims; with this exception, that any claim of the liquidators for costs and otherwise was to be postponed to the claims of *Grissell* under the agreement of the 22nd of December, 1866.

C. A. As against this order there were three appeals. The *International Financial Society* asked for priority over *Grissell*, and over the claims of the liquidators for costs and remuneration; the other debenture holders asked for priority over all claims except those of the *Financial Society;* and the liquidators asked for payment of their costs and remuneration in priority to *Grissell's* claims.

J. Pearson, Q.C., and *Davey*, Q.C., for the *Financial Society*:—

The agreement of the 22nd of December, 1866, was not an order of the Court, but a mere agreement; and even if it had been an order, it cannot be construed to bind the debenture holders who were not present. We are mortgagees, and are entitled to our security; and no creditor, however much he may have benefited the property, can come before us: *Holroyd* v. *Marshall* (1). There is no question here as to how the money arose.

Glasse, Q.C., and *C. T. Simpson*, for other debenture holders.

Higgins, Q.C., and *Hastings*, Q.C., for the liquidators.

Cotton, Q.C., and *Kekewich*, for *Grissell*:—

The payments made by *Grissell* are clearly in the nature of salvage, and must have priority. Some were for rents, rates, and taxes. Moreover, *Grissell* was an unpaid vendor with the legal estate, and has been acting not only under the order of the Court, but as an unpaid vendor protecting his property. The liquidators, representing all parties, might at any time have stopped *Grissell*, but did not. As long as *Grissell* was left in the management of the business, he must have a right to be repaid what he advanced for the business.

JAMES, L.J.:—

On the main point of this case I am clearly of opinion that there has been some miscarriage on the part of the Vice-Chancellor, probably due to this, that he fancied that he had in some way, acting in the winding-up, induced Mr. *Grissell*, by sanctioning that agreement, to lay out money, and that he thought, therefore, as he himself expressed it in his judgment, that the honour of the Court was in some way involved, and that it was for the honour of the Court to see that *Grissell* was paid the moneys which he had been induced by the sanction of the Court to lay out in carrying on the works.

But the honour of the Court cannot be satisfied at the expense

(1) 10 H. L. C. 191. 9 Jur. N.S. 213

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of somebody else, who is not in point of law or in point of equity bound to satisfy it out of his means. It really comes to the simple question of what was the right of the debenture holders. It appears that the machinery, plant, and effects (the proceeds of which are now in question) were well and effectually mortgaged to the debenture holders, and the debenture holders were, in my opinion, in exactly the same position as any other equitable mortgagees who had lent money to the company.

Then the company, finding themselves in difficulties, borrow money from *Grissell*, and desire him to carry on the business. The company finding themselves in greater difficulty, a supervision order is obtained from the Court, which gives the Court a great power of sanctioning and directing what is to be done. Then the Vice-Chancellor, upon somebody's motion—it does not appear clearly before us how—took upon himself to summon the liquidator and *Grissell* before him, and in the presence of the Vice-Chancellor an agreement is come to between *Grissell* and the liquidator on behalf of the company, which, being sanctioned by the Court, effectually bound the company whose liquidator was there. But no debenture holder was summoned, no debenture holder was asked whether he did or did not approve of the arrangement, and in the absence of the debenture holders, whatever was the construction of that agreement, the debenture holders could not be affected by it.

It is said that the transaction was for the benefit of the debenture holders, and that if this property had been sold at that time, in all probability it would have sold badly, and therefore it was for their benefit that the works should be carried on. But, then, the debenture holders were the persons who had a right to express their opinion whether the business should be carried on at their risk. Of course as long as the company were minded to keep it on, the debenture holders might very reasonably be minded not to interfere with what their mortgagors and debtors were doing, because their security—the thing which constituted their security—was still remaining *in esse* to answer their demands. Therefore they had no occasion to apply their minds to the question whether it would be to their benefit or not that the works should be carried on. Their debtors, who acted with the sanction of

the Court, thought it was for their own benefit that it should be carried on, but that left the property still remaining liable to the charge.

In truth, however, there was no attempt to do what of course the Court would not have done in the absence of the debenture holders—there was no attempt by that agreement to interfere with the rights of any persons who were not before the Court at that time. When the document is looked at, it is seen to be an agreement entirely within the competence of the parties to make with the sanction of the Court, but it was within the competence of those parties, and within the jurisdiction of the Court, because it expressly and guardedly abstained from affecting any interests of any person whatever who was not then before the Court. The agreement simply enables *Grissell* to go on working, advancing his money for carrying on the works, and giving him a charge upon all the proceeds of all the things that were to be realized by carrying it on. He might have been disposed to run that risk, because he was at that time a very considerable mortgagee of the property in respect of his unpaid purchase-money, and he in that character might very well say, "This is not a year in which I should like to have the property sold; I would rather run the risk of carrying on the work and getting paid the moneys I advance, keeping the whole thing in my control." I believe *Grissell* was also largely interested as a holder of fully paid-up shares in the company, so that he had a deep interest which might have induced him to do it.

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The agreement did not profess to bind, and it could not in point of law have bound, persons who were not before the Court. I am of opinion, therefore, that on the main point the order of the Vice-Chancellor has improvidently emanated from him.

There are one or two minor points to be mentioned. First of all, it is suggested that what *Grissell* has paid for rent and taxes during that time was paid by way of salvage, because the lessor would have entered for a forfeiture if he had not paid these debts. It does not appear whether that would be so or not, but in truth these payments of rent and taxes were made as part of the current outgoings of the business when he was managing the business under those agreements, and of course would be outgoings

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to which the very first receipts from the business would be applicable. I am of opinion, therefore, that he paid those sums, not on behalf of the debenture holders, not for the purpose of securing the debenture holders anything, but merely as part and parcel of the management which he was carrying on under the agreement that he made. That being so, it appears to me that there is no claim which he can sustain against the mortgagees for payment of those sums.

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Then another point is this: It is said, *non constat*, that some of the plant that was sold was not bought by him since the agreement of December. That agreement certainly does not authorize the purchase of any plant. He had a right to purchase materials to pay wages and carry on the working, and there is in fact no suggestion that anything like plant was really bought by him. If there was, the parties ought to have taken care to have prevented that passage appearing in the Chief Clerk's certificate that the whole fund in Court was the proceeds of the leaseholds, plant and machinery.

I am of opinion, therefore, taking the statement as it stands, that the proceeds of the leaseholds of machinery and of plant belong to the debenture holders, and not to *Grissell*, subject of course to the costs of realization.

Mellish, L.J.

MELLISH, L.J.:—

I am of the same opinion. I think it is clear that the charge given in favour of the debenture holders upon the lease and the machinery and the plant could not possibly be affected by a subsequent agreement between the liquidator and *Grissell*, assented to by the Vice-Chancellor, even if the Vice-Chancellor was right in thinking it was an order of the Court.

Then it was argued on behalf of *Grissell*, that in respect of the rent and the taxes and the rates which had been paid subsequently to the making of the agreement of December, 1866, he was entitled, because he was a vendor in possession, and under his agreement for purchase he, as vendor in possession, was entitled to pay all those charges, and have the same charge as he would have for his purchase-money, and that that would take precedence of the rights of the debenture holders, which are merely equitable

rights, claiming under the company. In my opinion, besides the other answers which probably might be given to that argument, if the agreement of December, 1866, is looked at, it is perfectly plain that the rent and rates and taxes were paid under and by virtue of that agreement, and upon the terms that he should have the particular security given to him by that agreement for those payments, and that it is perfectly inconsistent with his being vendor in possession, having the rights which a vendor in possession would have under the original purchase deed. If *Grissell* intended to have the rights of a vendor in possession under the original purchase agreement, when he was called before the Vice-Chancellor to make an agreement with the liquidator for the carrying on of the works he ought to have said, "I am the vendor in possession, and as the vendor in possession I have a right to carry on the works by the terms of the agreement on certain terms, and on certain security, and that I shall do, and I do not want your consent to my doing that." But instead of that, he entered into an agreement which is on a totally different footing, and under which he gets a charge on all the debts, and is empowered to collect them, which is a different charge. It seems to me that there is a complete inconsistency between his being vendor in possession and his having the rights which are given him by this agreement in December, 1866, and it is clear that this rent, rates, and taxes, were advances under the agreement of December, 1866, and he can have the security given to him by that agreement, and no other security.

That security does not touch the property which had been previously charged for the benefit of the debenture holders, as in fact it could not have touched it, even if it professed to do so.

I agree also with what the Lord Justice has said, that there is no information to induce us to order further inquiries, and that we must decide this case on the facts which are before us on the settled statement.

BAGGALLAY, J.A.:— Baggallay, J.A.

I am of the same opinion, and for the same reasons as have been given by the Lords Justices. I do not think it desirable to add anything.

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Judgment, C. A. Brett, J.

BRETT, J.:—

As I understand it, two main questions are raised here: first, whether the order of the Vice-Chancellor can stand as it is; and, secondly, if it cannot, whether certain variations which have been suggested should be made in it.

As I understand the case, the question is, whether the order that the proceeds of a certain sale should be paid to *Grissell* before the debenture holders, so far as to repay him his advances, is erroneous. The argument on one side is, that the order of the Vice-Chancellor should be sustained because the disbursements to which this priority is given were made under an order of the Vice-Chancellor, that that order did give to *Grissell* this priority over the debenture holders, and that the Vice-Chancellor was justified in making such an order. On the other side it is said that no order at all was made by the Vice-Chancellor; that there was on the 22nd of December an agreement between the liquidator and *Grissell;* that if this agreement was an order of the Vice-Chancellor, upon the true construction of it, it does not give this priority to *Grissell;* and that if it were an order, and the true construction of it were that it does give this priority, or assume to give this priority, that it would be an order that the Vice-Chancellor was not entitled to make.

Now, in the first place, it is said that it is an order, because it has been approved of by the Vice-Chancellor. But that argument seems to me to go this length, to say that everything which is done in a voluntary winding-up under the supervision of the Court is done under an order of the Court, and it would make a voluntary winding-up under supervision the same thing as a winding-up under the order of the Court. I cannot think that the meaning of the Act of Parliament is, that the approval of the Court to things which are done in a voluntary winding-up under its supervision amounts to an order of the Court in any way.

But if this were an order, it seems to me that it does not give that priority; and, certainly, if it were an order, and if upon the true construction of it, it did give this priority, it seems to me that the Court could not by any order of its own take away from the debenture holders any rights which they had. Now the debenture holders, by the terms of the mortgage to them, have a

mortgage on the leaseholds and machinery and plant of this company, and that was a first charge upon it, and no subsequent agreement by anybody except themselves, and no order of any Court could take away that priority from them. Therefore I think it was not an order, and if it were an order, the interpretation put upon it by the Vice-Chancellor in his last order was incorrect, and that if it were an order, and if his construction were right, then it was an order which he could not make as against these debenture holders. Therefore I think that the order cannot stand as it is.

Then I come to the question whether it should be varied as suggested by Mr. *Cotton*. Now the first point raised about that is with regard to these alleged payments of rent, rates, taxes, and insurance. I will accept the alleged doctrine, that if he had been the unpaid vendor in possession, as unpaid vendor he might have made those payments, but I do not think that he was in this case in possession as unpaid vendor. By the original agreement of sale he might have gone into possession as an unpaid vendor, but if he had done so the business must have been his own. It may be said that in one sense he was actually in possession, that is, he was the person carrying on the business, but he was there, not as unpaid vendor, which would have made the business his own, and him liable for everything, but he was there as director for the company—in other words, he took possession for the company, and not on his own account as unpaid vendor; and certainly, after the agreement of the 22nd of December, it seems to me, for the reasons given by Lord Justice *Mellish*, impossible to suggest that he was in possession as unpaid vendor. When he paid the rent, rates, taxes, and insurance, he certainly did not pay them in the character of unpaid vendor in possession. I think, therefore, that the alleged doctrine cannot apply.

With regard to the other suggestion, I should have thought that if any part of this fund had been the proceeds either of materials sold or of plant or machinery bought by him after the 22nd of December, that such plant and machinery, or the proceeds of such materials, should not have gone to these debenture holders, and I should have thought that an inquiry ought to be made. But I can find nothing but a suggestion made in Court that anything of

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the kind has taken place, and certainly that suggestion is absolutely contrary to the finding in the statement before us. I therefore think that is a matter which ought not to be noticed, and in respect of which no order of the Court ought to be made.

Argument.

Higgins, Q.C., and *Hastings*, Q.C., for the liquidators, then proceeded to argue against the claim for priority of the debenture holders:—

This company is the creature of the Act of 1862, and its assets must be administered according to that Act, which provides expressly for the costs of the liquidators. The debenture holders have allowed liquidators to be appointed, and have had the benefit of their labour, and must allow them their costs and remuneration. But for that, the whole property would have been lost. They were appointed by the Court, and the Court must provide for their costs. If it had been a suit either as Plaintiffs or as receivers, they would have had their costs: *Perry* v. *Oriental Hotels Company* (1). The Act expressly provides by sect. 133 that the liquidators may carry on the business, and if so, they must have their costs. The debenture holders cannot be allowed to lie by for nine years and then come and claim the benefit of all that has been done without paying for it.

Judgment, C. A. James, L.J.

JAMES, L.J.:—

I am of opinion that the claim on behalf of the liquidators cannot be sustained. No doubt it is a very hard case for them that they have had to deal with an insolvent company, but they ought to have looked into that matter before they incurred expenses and made themselves liable. Those who render services to an insolvent company, or an insolvent person, frequently find they have to go without payment, and the liquidators should not have incurred disbursements which they had no means of being reimbursed. I do not wish to refer to what I said myself on the former occasion, except that it was an order of the Court of Appeal made upon consideration of this matter, and it appears

(1) Law Rep. 12 Eq. 126.

that the only thing which could be left open was the costs of the preservation and of the sale of the property; but the costs of the liquidators in the liquidation, and the ordinary costs of the proceedings, were not in any way to be even kept open from that day to this as between the liquidators and the debenture holders. The debenture holders are the creditors to whom the property belonged; they were creditors of the company independently, but besides being creditors of the company they had a specific right to the property for the purpose of paying their debts. If the property is realized in the proceedings to which they are parties they must pay the costs of the realization, just as they would have had to pay them if they had their own suit for the purpose of realizing it, or if they had employed a person out of doors. Those are charges to be deducted out of the proceeds of the property, and they are only entitled to the net proceeds of the property.

No doubt, as I said before, it has been argued that there were costs of preservation, which means that by keeping the thing going for some years the property ultimately realized more for the debenture holders than it would have otherwise realized. But this is merely a surmise which we cannot adopt, and even if it were true it would really make no difference whatever. The services rendered in that way affected the mortgagors, and though continuing the business might ultimately tend to make the property fetch more, it cannot create a charge against the mortgagee. The only costs for the preservation of the property would be such things as have been stated, the repairing of the property, paying rates and taxes, which would be necessary to prevent any forfeiture, or putting a person in to take care of the property. It is quite clear from all that we know in this case here that these liquidators never paid anything of that kind. The property which is the subject-matter of these proceedings, that is to say, the leaseholds, machinery, and plant, never has been the subject of expenditure on the part of the liquidators.

That being so, I think the Vice-Chancellor quite right in confining the order to the costs of realization.

MELLISH, L.J.:— Mellish, L.J.

I am of the same opinion.

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Judgment, C. A. Baggallay, J.A.

BAGGALLAY, J.A:—

I also am of the same opinion, though I cannot but regret that gentlemen should be placed in the position in which these gentlemen appear to have been placed for so many years. But this is one of the risks that those who engage in a profession of this kind must run. I regard this question as one entirely between the liquidators and the debenture holders, and it may be possible that the liquidators may have claims against particular debenture holders with respect to the course they may have taken. With regard to that I desire to say nothing, but considering this merely as a question between liquidators and debenture holders as a body, it appears to me there is no claim whatever beyond that which the Vice-Chancellor has allowed, namely, that in respect of the realization of the property.

Brett, J.

BRETT, J.:—

I am of the same opinion.

MINUTES:—Vary order of Vice-Chancellor, and make a declaration that the costs of *Grissell* and the liquidators properly incurred in realizing the properties comprised in the debenture security are to be paid out of the fund: and, subject thereto, the fund belongs to the debenture creditors. Debenture creditors to add their costs of appeal to their debt. Liquidators to have their costs, less any costs occasioned by their appeal out of the fund. No costs to *Grissell*.

Solicitor for *Financial Society: G. M. Clements.*
Solicitor for other parties: *C. Morgan.*
Solicitors for Liquidators: *Argles & Rawlins.*
Solicitors for *Grissell: Bircham & Co.*

ROACH *v.* TROOD.

C. A.
1874
V.-C. M.
Dec. 14.
C. A.
1875
Dec. 14, 20.
1876
Jan. 29.

[1872 R. 33.]

Fraudulent Appointment—Void Condition annexed to Appointment—Benefit of Appointee—Contemporaneous Re-settlement—Family Arrangement.

Under a marriage settlement made in 1820, a father had a power of appointment among his children. He afterwards borrowed the funds subject to the power, amounting to £6000, from the trustees of the settlement, on the security of a freehold estate which was his own property.

On the marriage of his only daughter in 1853, the father settled a sum of £3000 upon her out of his own property.

In 1863, the father executed three deeds of even date. By the first, he made a voluntary settlement of the freehold estate with some other property on his eldest son, *E.*, for his life, with remainder for the benefit of *E.'s* children or remoter issue, as *E.* should appoint, and in default of appointment, to *E.'s* children equally, and in default of children, to himself in fee.

By a second deed, the father appointed the whole of the £6000 under his marriage settlement to *E.*, absolutely; and the same deed contained a release by the father and his wife, and also by *E.* and the surviving trustee of the settlement, of the mortgage debt of £6000, and a conveyance by the same parties of the freehold estate discharged from the mortgage to the uses of the voluntary settlement of even date.

By a third deed, the father gave the residue of his property to his only other son, *R.*

The father made his will, bearing the same date, and thereby confirmed the three deeds of even date, and charged his ultimate remainder under the first deed with £3000, in favour of his only daughter, *M.*, and subject thereto, gave the same to *R.*

The father died in 1864.

E., although made a party to the two first-mentioned deeds of even date, was not consulted on their preparation, and he at first refused to execute them, but he did in fact execute them in the year 1871:—

Held (reversing the decision of *Malins*, V.C.), that in the opinion of the Court the arrangement by which the mortgage debt of £6000 had been released and the ultimate remainder reserved to the father had not been made for the purpose of benefiting the appointor; and that the appointment was not fraudulent or invalid:

Held, also, that the condition annexed to the appointment, that *E.* should release the estate from the mortgage debt, was not binding upon *E.* until he

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assented to the arrangement; and that he might have claimed the benefit of the absolute appointment in his favour discharged from the condition, but that, having executed the deeds, he had by his voluntary act assented to be bound by the conditions.

Re Marsden's Trust (1) and *Topham* v. *Duke of Portland* (2) distinguished.

Statement.

THIS was an appeal from a decision of Vice-Chancellor *Malins*.

By the settlement made in contemplation of the marriage of *Edward Trood* with *Mary Smith*, and dated the 14th of January, 1820, it was declared that the trustees should stand possessed of certain bank annuities upon trust to permit the said *Edward Trood* to receive the income during his life, and after his decease to pay the income to the said *Mary Smith* for her life, and from and after the decease of the survivor of them, upon trust to assign and make over the said bank annuities unto and amongst or in trust for the benefit of all and every or such one or more of the children of the marriage as the said *Edward Trood* should by deed or will appoint, and in default of appointment, as the said *Mary Smith*, if the survivor, should appoint, and in default thereof to assign and make over the trust moneys unto all the children or issue of the said then intended marriage, as tenants in common.

There was issue of such marriage four children only, viz., the Defendant, *Edward Trood*, who was the eldest son, the Defendant *Robert Trood*, and the Plaintiff, *Mary Roach*, all of whom attained the age of twenty-one years in the lifetime of their father, and *Thomas Trood*, who died an infant. The trustees of the settlement received and realized the funds subject thereto, and on the 28th of March, 1827, lent the same, which then amounted to the sum of £6000 sterling, to *Edward Trood*, the father, upon a mortgage in fee of a certain farm known as *Bowhay and Mays*, situate in the parish of *Exminster*, in the county of *Devon*.

Upon the occasion of the marriage of his daughter, the Plaintiff *Mary Roach*, in 1853, *Edward Trood* the elder made a provision for her to the amount of £5000, and ten years later he determined to make a disposition of the residue of his property in favour of his two sons; his property then consisted of the said farm called *Bowhay and Mays*, subject to the mortgage for £6000

(1) 4 Drew. 594. (2) Law Rep. 5 Ch. 40.

to the trustees of his marriage settlement, and of certain other freehold properties in the county of *Devon*, including about eight acres of marsh land in the parish of *Alphington*, and an undivided moiety of certain other lands in the parish of *Crediton*. He was also possessed of live and dead stock, and other personal estate of considerable value.

For the purpose of effectuating this determination he caused three several indentures, respectively dated the 6th of April, 1863, to be prepared. The first of these indentures was expressed to be made between the said *Edward Trood* the elder of the first part, the Defendant *Edward Trood* of the second part, and the Defendant *Robert Trood* of the third part, and thereby, after reciting that the said *Edward Trood* the elder, in consequence of his increasing infirmities and advanced age, had determined to relinquish the management of his affairs and to make an immediate provision for his two sons, which provision as to the Defendant *Edward Trood* was to be as thereinafter expressed, it was witnessed that the said *Edward Trood* the elder did thereby grant unto the Defendant *Edward Trood*, his heirs and assigns, the said farm and lands called *Bowhay and Mays*, and also the said marsh land at *Alphington* and the pew known as *Bowhay Pew* in *Exminster* church, to hold the same to the use of the Defendant *Edward Trood* during his life, with power in the event of his marriage to charge the said hereditaments and premises with an annuity not exceeding £100 for his wife or widow, and from and after the decease of the Defendant *Edward Trood*, upon and for such uses and trusts for the benefit of the children or more remote issue of the Defendant *Edward Trood* as the Defendant *Edward Trood* should by deed or will appoint, and in default of such appointment, then to the use of all the children of the Defendant *Edward Trood* as tenants in common: And in the said indenture was contained a proviso that if there should be no child of the Defendant *Edward Trood* who should acquire an interest in the said hereditaments and premises under the provisions therein contained, the said hereditaments and premises should go over and be to the use of the said *Edward Trood* the elder, his heirs and assigns, for ever: And by the same indenture the said *Edward Trood* the elder granted and assigned to the Defendant *Edward Trood*, his heirs, executors, ad-

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ministrators, and assigns, the said undivided moiety of marsh land in the parish of *Crediton*, and also all the live and dead stock and other personal estate and effects therein particularly mentioned and described.

The second indenture, also dated the 6th of April, 1863, was expressed to be made between the said *Edward Trood* the elder of the first part, *Mary Trood*, his wife, formerly *Mary Smith*, of the second part, the Defendant *Abraham Smith* (who was the devisee of trust estates of the surviving trustee of the aforesaid marriage settlement) of the third part, the Defendant *Edward Trood* of the fourth part, and *John Geare* of the fifth part, and, after reciting the indenture of settlement of the 14th of January, 1820, the indenture of mortgage of the 28th of March, 1827, and the deed of gift of even date, and further reciting that the said *Edward Trood* the elder and *Mary* his wife were respectively desirous that the said hereditaments should be enjoyed by the Defendant *Edward Trood* and his issue pursuant to the limitations contained in the said deed of gift discharged from the said mortgage, and that it had been accordingly agreed that the aforesaid settled moneys should be appointed and the said hereditaments released and conveyed in manner thereinafter expressed, and further reciting that, in consideration of the Defendant *Abraham Smith* joining therein, it had been agreed to execute such release as was thereinafter contained in relation to the trusts of the said settlement, it was witnessed that the said *Edward Trood* the elder, in exercise of the power for that purpose given to him by the said indenture of settlement, did thereby irrevocably appoint that from and after the decease of the survivor of them the said *Edward Trood* the elder and *Mary* his wife, all and singular the trust funds or property comprised in or affected by the said indenture of settlement should remain and be upon trust for the absolute benefit of the Defendant *Edward Trood*, his executors, administrators, and assigns: And by the same indenture it was further witnessed that the said *Edward Trood* the elder in respect of his life interest, and the said *Mary Trood* in respect of her reversionary interest in the moneys secured by the said mortgage, and the Defendant *Edward Trood* in respect of his right to the capital of the moneys secured by the said mortgage in expectancy upon

the death of his said parents, did thereby severally and respectively release, and the Defendant *Abraham Smith*, according to his estate or interest, and by the direction of the said *Edward Trood* the elder and *Mary* his wife, and of the Defendant *Edward Trood*, did thereby grant and release unto the said *John Geare*, his heirs and assigns for ever, all and singular the aforesaid lands and hereditaments called *Bowhay and Mays*, and other, if any, the hereditaments comprised in or subject to the operation of the said mortgage, to hold the said hereditaments and premises unto the said *John Geare*, his heirs and assigns for ever, freed and discharged from the said security, but to such uses, upon such trusts, and with and subject to such powers and provisions as were in and by the said indenture of even date expressed and declared of and concerning the same.

These two deeds were executed by the several persons expressed to be parties thereto, other than the Defendant *Edward Trood* and the said *John Geare*, at or about the time of the date thereof, but neither of the said deeds was then executed by the Defendant *Edward Trood*, who refused at first to concur in them, but ultimately executed them in the year 1871.

By the third indenture, dated also the 6th of April, 1863, the said *Edward Trood* the elder gave to the Defendant *Robert Trood* the residue, or the greater part of the residue, of his property.

On the same day, the 6th of April, 1863, the said *Edward Trood* the elder executed his will of that date, and by such will, after certain specific and pecuniary legacies, he confirmed the deeds of gift respectively executed by him in favour of his two sons and of the children or other issue of the Defendant *Edward Trood;* and after referring to the contingency upon the happening of which the estate called *Bowhay and Mays* and the marsh land in the parish of *Alphington* were limited to the use of himself, his heirs and assigns, and expressing his desire to provide for the happening of such contingency, he declared that upon the happening thereof the said lands and premises should be charged with the sum of £3000 for the children of his daughter, the Plaintiff *Mary Roach*, in equal shares, and subject to such charge, and to the estates, rights, or interests of those in whose favour the said deed of gift

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was made, he devised the said estate and marsh land, as well as all the real and personal estate and effects whatsoever over which he retained the power of disposition, unto his son *Robert*, his heirs, executors, administrators and assigns, absolutely.

Mary Trood died in February, 1864, in the lifetime of *Edward Trood* the elder, and *Edward Trood* the elder died on the 14th of September, 1864, without altering his will, which was duly proved.

After the death of *Edward Trood* the elder, the Defendant *Edward Trood* disputed the validity of the three deeds of the 6th of April, 1863, alleging that they had been obtained by fraud and undue influence of the Defendant *Robert Trood*, and on the 7th of April, 1865, he filed a bill to which the Defendant *Robert Trood* and the Plaintiffs were made Defendants, and thereby prayed that the said three deeds might be set aside. Such suit, however, was not proceeded with, and in the early part of the year 1866 the bill therein was dismissed with costs on the application of *Edward Trood*, the Plaintiff in the suit.

The present bill was filed by *Mary Roach* and her husband against her two brothers, *Edward Trood* and *Robert Trood*, alleging that the appointment was made by *Edward Trood* the elder, not for the benefit of his son, the Defendant *Edward Trood*, but with the object of relieving his own estate from the obligation to pay the sum of £6000, and of enabling him to dispose of his estate called *Bowhay and Mays*, freed from the mortgage created thereon for securing the said sum; and it prayed for a declaration that the appointment of the sum of £6000 in favour of *Edward Trood* was fraudulent and void as against the Plaintiffs, and that their one third share ought to be raised by mortgage out of the *Bowhay and Mays* estate.

The case came on for hearing before Vice-Chancellor *Malins* on the 14th of December, 1874.

J. Pearson, Q.C., and *Freeling*, for the Plaintiff.

Glasse, Q.C., and *Bevir*, for *Edward Trood*.

Cotton, Q.C., and *Chapman Barber*, for *Robert Trood*.

Marten, Q.C., and *Morshead*, and *Badcock*, for other parties.

MALINS, V.C., after stating the facts of the case, continued:—

There is no question whatever that *Edward Trood* the elder might properly on that occasion, without assigning any reason, have made an absolute appointment of £6000 to the eldest son, *Edward*, or to any other of his children, because he had an exclusive power of appointment, and therefore could have given all to one, or divided it as he thought fit. If, therefore, he had executed a deed by which he simply appointed the £6000 to *Edward*, no objection could have been raised.

Then it has been said by Mr. *Glasse* and Mr. *Bevir* (and I entirely agree with the cases that have been cited on that point) that in these cases of appointments you must look at the surrounding circumstances and see what was the real transaction. If Mrs. *Roach* had been brought into this arrangement and had got any benefit, and I could see that it was a proper family arrangement, I should be willing to adopt the principle laid down in *Askham* v. *Barker* (1), and by Vice-Chancellor *James* in *Cooper* v. *Cooper* (2), and to have supported this appointment. Unfortunately, the business did not take that shape, for having first of all settled this estate, which was subject to the charge of £6000, upon the son for life, with remainder, as I have stated, to the children, and remainder in reversion to himself in fee, he executed another deed of the same date, which is sought to be impeached. [His Honour then stated the material contents of the second deed, and also of the third deed of even date, and continued:—] *Edward Trood* also made his will on the same day, the effect of which is to confirm these transactions and to give *Robert Trood* his whole property, subject only to this, that on the happening of a certain event—namely, the failure of *Edward's* issue—£3000 was to go, not to the daughter, but to her children. I was at first under the impression that there would be in effect a case of election against the daughter; but as the gift is not to herself and children, no case of election arises, and only in a certain event the £3000 goes to the daughter. Up to the 6th of April, 1863, it is perfectly clear that the daughter had vested in her, subject to its being divested by the execution of the power, one-third of the £6000,

(1) 17 Beav. 37. (2) Law Rep. 8 Eq. 312.

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and if the settlement stands, she is divested of that by the deed of the next day.

The question is, Can this transaction stand? If there is an appointment for the benefit of the objects of the power, there being no corrupt motive and no bargaining by the father for himself, then she is deprived of any interest in the fund; but when I find that the appointment is in fact to *Edward* only for life, with remainder to his issue not objects of the power, with remainder to the testator, who is the donee of the power and cannot exercise it for his own benefit, I cannot do otherwise than come to the conclusion that there has been that degree of irregularity in the execution of the deed that the result is, without any compensation to the daughter for the interest vested in her before this power was executed, she is by this transaction deprived of all interest, while the attempt is to confer that interest upon persons some of whom are not objects of the power—namely, *Edward*, his children (if he had any), and the testator himself, who by his will disposes of the interest which he acquired under it.

I am unable to bring this case within any of the decisions relied on by the Defendant *Edward Trood's* counsel; but I think it does fall within the cases relied upon by the other side, namely, *Topham* v. *Duke of Portland* (1) and *Re Marsden's Trust* (2), where it was decided that if there be any collateral advantage to persons who are not objects of the power, however good the intention, that is enough to vitiate the appointment. The recitals in the deed shew the object was not to give the property absolutely to *Edward*, but to release the estate of which he was made tenant for life, for the benefit of him and those interested in it. In my opinion that vitiates the appointment. There will therefore be a declaration that the appointment is invalid so far as it affects the interests of the Plaintiff.

C. A.

From this decision the Defendant *Edward Trood* appealed, and the appeal came on for hearing on the 14th of December, 1875.

Argument.

Chitty, Q.C., and *B. B. Rogers*, for the Appellant:—

We contend, first, that there was a good appointment to *Edward*

(1) 1 D. J. & S. 517; Law Rep. 5 Ch. 40. (2) 4 Drew. 594.

Trood, followed by a void condition that he should release the estate from the mortgage, which condition he had a right to neglect: *Sugden* on Powers (1); *Farwell* on Powers (2); *Alexander* v. *Alexander* (3); *Sadler* v. *Pratt* (4); *Woolridge* v. *Woolridge* (5); *Churchill* v. *Churchill* (6); *Lassence* v. *Tierney* (7); *Kellett* v. *Kellett* (8).

Secondly, we say that the appointment was good, although made with a view to a contemporaneous re-settlement by the Defendant *Edward Trood*. Such an appointment is good, provided there is no bargain between the appointor and appointee, and there was no bargain here: *White* v. *St. Barbe* (9); *Birley* v. *Birley* (10); and such appointments will be upheld even though the deed of appointment may be incorrectly framed. There would have been no objection to the present appointment if the release had been made by a separate deed, and the Court will not allow the appointment to fail merely because what ought to have been done by two deeds has been done by one: *Daniel* v. *Arkwright* (11); *Re Gosset's Settlement* (12); *Sugden* on Powers (13). It is true that the appointor reserved to himself the ultimate remainder, but an appointment is not necessarily void because the appointor may derive a benefit from it. The question is whether the appointor was influenced in making the appointment by the possible benefit which he might receive: *Cooper* v. *Cooper* (14); *In re Huish's Charity* (15); *Askham* v. *Barker* (16); *Vane* v. *Lord Dungannon* (17). In the present case the appointor was advanced in life, and the possible benefit which he might receive was very trifling, and on the other hand the benefit given to *Edward Trood* by the whole transaction was substantial, and far exceeded the value of the ultimate reversion. The two cases of *Topham* v. *Duke of Portland* (18) and *Re Marsden's Trust* (19), which are relied on by the other side, are dis-

(1) 8th Ed. p. 526.
(2) Page 235.
(3) 2 Ves. Sen. 644.
(4) 5 Sim. 632.
(5) Joh. 63.
(6) Law Rep. 5 Eq. 44.
(7) 1 Mac. & G. 551.
(8) Law Rep. 3 H. L. 160.
(9) 1 V. & B. 399.
(10) 25 Beav. 299.
(11) 2 H. & M. 95.
(12) 19 Beav. 529.
(13) 8th Ed. p. 671.
(14) Law Rep. 8 Eq. 312; 5 Ch. 203.
(15) Ibid. 10 Eq. 5.
(16) 17 Beav. 37.
(17) 2 Sch. & Lef. 118.
(18) Law Rep. 5 Ch. 40.
(19) 4 Drew. 594.

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tinguishable, for in both these cases the whole purpose of the appointments was unjustifiable.

Thirdly, we say that if the gift is not fraudulent, it cannot be impeached merely on account of the transaction conferring a benefit on persons who are not objects of the power, but it is good to the extent of the life estate of the Defendant *Edward Trood*. The life estate may be severed from the limitations to the children and the ultimate remainder to the appointor.

Badcock, for an infant child of the Appellants.

J. Pearson, Q.C., and *Freeling*, for the Plaintiffs:—

The appointment is fraudulent and void *in toto*. The whole transaction is indivisible, and the intention of the appointor was that persons should be benefited who were not objects of the power. *Topham* v. *Duke of Portland* (1) and *Re Marsden's Trust* (2) are precisely in point. It is said that the same result might have been produced legally if the appointor had taken some other course; but powers must be strictly executed, and the Court has never encouraged laxity in dealing with them.

It is also contended that the appointment, though void in part, may be upheld as to the life interest of *Edward Trood*. But the Court cannot separate the good limitations from the bad without disturbing the whole effect of the settlement. The limitation to the children, and the ultimate remainder to the appointor, are essential parts of the transaction. If the appointor had been told that the limitation beyond the life estate would fail, he would never have made the appointment at all: *Hamilton* v. *Royse* (3); *Birley* v. *Birley* (4); *Carver* v. *Richards* (5); *Salmon* v. *Gibbs* (6); *Thacker* v. *Key* (7); *Askham* v. *Barker* (8).

Cotton, Q.C., and *Chapman Barber*, for *Robert Trood*.

Marten, Q.C., and *Morshead*, for the trustee.

(1) Law Rep. 5 Ch. 40.
(2) 4 Drew. 594.
(3) 2 Sch. & Lef. 315, 331.
(4) 25 Beav. 299.
(5) 1 D. F. & J. 548.
(6) 3 De G. & Sm. 343.
(7) Law Rep. 8 Eq. 408.
(8) 17 Beav. 37.

B. B. Rogers, in reply, referred to *Wallgrave* v. *Tebbs* (1); *Rucker* v. *Scholefield* (2); *Daniel* v. *Arkwright* (3).

1876. Jan. 29. BAGGALLAY, J.A., delivered the judgment of the Court (*James*, L.J., *Mellish*, L.J., and *Baggallay*, J.A) as follows:— Judgment, C. A.

The question involved in this appeal is, whether an appointment of a sum of £6000, bearing date the 6th of April, 1863, and expressed to be made in the execution of a power conferred upon one *Edward Trood* by the settlement made on his marriage in January, 1820, was a valid exercise of such power.

The appointment is in form an absolute appointment in favour of the Defendant *Edward Trood*, who was the eldest son of the appointor and an object of the power, but its effect, when taken in connection with the provisions of a deed of gift of even date, is to confer benefits not only upon the Defendant *Edward Trood*, but also upon other persons, including the appointor himself, who were not objects of the power. On the part of the Plaintiffs, it is contended that when the real nature and character of the transaction are inquired into, there is clear evidence that the intention of the appointor was to relieve himself from certain obligations to which he was subject, and not to benefit his son, and that the attempted appointment was consequently wholly void.

This is the reason assigned by the Plaintiffs in the 20th paragraph of the bill, and is the foundation upon which they base their claim for relief, but it has been further contended on their behalf in the arguments at the Bar, that even assuming that the appointment ought not to be set aside for the reason so assigned, yet that no effect, or at any rate a partial effect only, can be given to it by reason of its provisions being in favour partly of an object of the power and partly of persons who are not objects of the power.

The solution of the two questions thus raised by the Plaintiffs necessitate a careful consideration of all the circumstances of the case. The facts are not in dispute, and are as follows:—[His Lordship then referred to the facts and read the material parts of

(1) 2 K. & J. 313. (2) 1 H. & M. 36.
(3) 2 H. & M. 95.

C. A. 1876 ROACH v. TROOD. Judgment, C. A.

the deeds as stated above, and continued:—] Such being the facts of the case, the first question to be determined is whether, by fair and reasonable inference from such facts, the charges of fraud asserted by the Plaintiffs, and upon which, so far as the allegations in the bill are concerned, they rest their case, are established.

The charge in the 20th paragraph of the bill is to this effect: that the appointment was made by *Edward Trood* the elder, not for the benefit of his son, the Defendant *Edward Trood*, or with the intention that he should receive any part of the sum of £6000 for his own use, but with the object and for the purpose of relieving the estate of the said *Edward Trood* the elder from the obligation to pay the said sum, and of enabling him to dispose of his estate called *Bowhay and Mays*, freed and discharged from the mortgage created thereon for securing the said sum; and they further charge in the 21st paragraph that such attempted appointment was fraudulent and void as against the Plaintiffs, and that the said sum of £6000 is now divisible as in default of appointment.

Now there is abundant authority for the proposition that when an appointment has been made with the intention of defeating the purposes of the power, it will be treated as wholly invalid, even though it may to some extent apparently effectuate such purposes; but is it to be fairly and reasonably inferred from the circumstances of the present case that *Edward Trood* the elder had any intention of defeating the purposes of the power which he was entitled to exercise?

The fact that under the provisions of an appointment, whether such provisions appear upon the face of the instrument itself, or are to be gathered from extrinsic evidence, some persons who are not objects of the power may take interests in the appointed fund, either in conjunction with or in succession to persons who are objects of the power, is not of itself sufficient to invalidate the appointment. The reports abound with cases in which such appointments have been upheld.

Nor, again, does the fact, that the donee of the power may derive a benefit under the appointment, necessarily render the appointment invalid. In *Beere* v. *Hoffmister* (1) a husband and wife had power to appoint a fund to their children, which fund in

(1) 23 Beav. 101.

default of appointment was settled on all the children who should attain twenty-one, and in default of children who should acquire an interest, on the next of kin of the wife. There being but one child, aged three years and a half, and the wife being seriously ill, the husband and wife appointed the whole fund to the child, reserving a joint power of revocation. The child died two years afterwards, and her father thereupon became entitled to the fund, and on the validity of the appointment being questioned it was upheld.

On the other hand, in the case of *Wellesley* v. *Earl of Mornington* (1) an appointment made by a father in favour of his son, who, though of full age was of unsound mind and in very precarious health, and who shortly afterwards died intestate, was set aside at the instance of the daughter of the donee of the power.

The distinction in principle between the two cases is obvious: in neither case was the contingent interest reserved to the donee of the power very remote, but in each case his intention in making the appointment had to be gathered from the surrounding circumstances, and while in the latter case it was abundantly evident that the intention was to benefit himself at the cost of his daughter who was an object of the power, it was equally clear in the former that the intention was not to benefit himself, except in the event of the death of his daughter.

The case of *Re Marsden's Trust* (2) has been much relied upon by the Plaintiff's counsel in support of their contention that the appointment in the present case is wholly void, but the facts of that case were of a very special character, and Vice-Chancellor *Kindersley* in the course of his judgment expressly stated that in the view which he took of the evidence the power had been exercised in such a way as to defeat the purpose for which it was given. The appointment in that case was made by a mother about a year before her death in favour of a daughter who was under twenty years of age, and the eldest of several children, all of whom were objects of the power, and it extended to the entirety of the fund which was the subject of the power. It was, however, the intention of the appointor and of her husband that as soon as the daughter attained the age of twenty-one years she should be

(1) 2 K. & J. 143. (2) 4 Drew. 594.

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informed that the appointment had been made to her in order that she might make over one half of the fund to the father absolutely, and give him a life interest in the other moiety. The daughter did not become aware of this intention until she was informed of it by her father after she had obtained her majority, and on the validity of the appointment being questioned on behalf of the other objects of the power the daughter was advised to claim the whole benefit of the appointment for herself. The Vice-Chancellor declared the appointment void, and it is evident that to have upheld it in such a case would have been to give effect to the intentions of the father and mother, and to have defeated the real purpose of the power.

The case of *Topham* v. *Duke of Portland* (1), which was also much relied on by the Plaintiffs' counsel, was decided both by the Vice-Chancellor *James* and the Court of Appeal on similar grounds. As was observed by Lord *Hatherley* in the course of his judgment, a former appointment had been set aside on the ground that the appointee was a mere instrument for effecting the purpose of the donee of the power, which was foreign to that which was the true purpose of the power, and that while he gave implicit credence to the statements of both the appointor and appointee that the absolute appointment in favour of the latter had been made without any agreement between them, he inferred from all the evidence before him, and particularly from that of the appointee herself, that she was still under the same influence, and would still be a passive instrument to effect the purposes of the appointor.

It was upon the authority of these two cases that the Vice-Chancellor, though apparently unwillingly, and because he considered himself bound by them, made a decree in the Plaintiffs' favour, against which decree the present appeal is bought. After a very full consideration of all the circumstances of the present case, we are unable to arrive at the conclusion that they were such as to bring it within the authority of *Re Marsden's Trust* (2), or of *Topham* v. *Duke of Portland*, or of any other of the reported cases in which appointments have been set aside on the ground of corrupt or fraudulent intention. It is admitted that the value of the

(1) Law Rep. 5 Ch. 40. (2) 4 Drew. 594.

life and absolute interests made over to the Defendant *Edward Trood* by the two deeds of April, 1863, exceeded the value of the reversionary interest expectant on his death in the £6000, and having regard to the provision at the same time made for the son *Robert*, and to that previously made for the daughter, Mrs. *Roach*, on the occasion of her marriage, there is nothing on the face of the transaction, nor is there anything in the evidence, to indicate that it was made with the intention of benefiting *Edward Trood* the elder, or that it was other than part of a fair and reasonable division of a father's property amongst his children. And this view of the case is supported by a consideration of the provisions of the will of *Edward Trood* the elder of the same date as the deeds, which provisions, though they were necessarily revocable, clearly indicated that at the time when the deeds and the will were executed by *Edward Trood* the elder, he had no intention of deriving any advantage for himself from the exercise of the power, inasmuch as by his will he made over for the benefit of his son *Robert* and the children of his daughter any interest which he or his estate might derive from the happening of the contingency of his eldest son dying without having had any issue capable of taking under the deed of gift.

Upon the whole, we are of opinion that a case has not been established for setting aside the deed of the 6th of April, 1863, on the ground of its having been made with any such corrupt or improper intention as is alleged in the Plaintiffs' bill. But though the appointment ought not to be set aside upon the grounds just adverted to, the second question raised by the Plaintiffs remains to be considered, and that is what is the effect, if any, to be given to it, for it may well be that an appointment may not be void by reason of its having been made with any corrupt or improper intention, and yet may wholly or partially fail of effect by reason of the nature of the disposition attempted to be made by it. It has been suggested, though it has hardly been argued, on behalf of the Plaintiffs, that the provisions in favour of the Defendant *Edward Trood*, and then in favour of persons who are not objects of the power, are so dependent the one on the other that they cannot be separated, and that consequently the appointment must wholly fail of effect.

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But this view of the case can clearly not be maintained. The cases in which limitations in favour of persons not objects of the power follow limitations for life in favour of persons who are objects of the power are those in which appointments have been most frequently partially maintained, and in the present case we think that the appointment must be treated as valid, at least to the extent of the life interest of the Defendant *Edward Trood.*

The question whether any and what greater effect should be given to it is at first sight somewhat complicated by the circumstance that though the Defendant *Edward Trood* was not a party to the arrangement under which the deeds of 1863 were executed, and for several years after his father's death refused to be bound thereby, he nevertheless, in the year 1871, executed both of those to which he was expressed to be a party.

Now, if the Defendant *Edward Trood* had never executed the deeds, or assented to the arrangement purported to be made by them, there could, in our opinion, be no doubt as to his right to have claimed the benefit of the absolute appointment in his favour, and to have treated as void the conditions attempted to be imposed upon him of his assenting to the release of the estate from the charge. The case in such event would not have differed in principle and in circumstances from that of *Churchill* v. *Churchill* (1), in which a father, having a power of appointment among his children, by his will appointed the fund over which he had the power to his three daughters equally, and gave his residuary estate to the same three daughters equally, and then directed that the share to which each daughter was entitled, as well under the appointment as under the residuary gift, should be held in trust for the daughter for life, with remainder to her children, and in that case the appointment was held to give the daughters an absolute interest in the appointed fund.

If such, then, would have been the right of the Defendant *Edward Trood* if he had never executed the deeds of April, 1863—a right which, as against those who would be entitled in default of appointment, he was entitled to assert at least from the date of his father's death if not from the date of the deeds—the only effect of his subsequent execution of the deeds in 1871 was to impose

(1) Law Rep. 5 Eq. 44.

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upon him the condition of not asserting as against those who were or would be entitled, under the provisions of the deeds, any rights or claims inconsistent with such provisions; in other words, to impose upon him, as the result of his own voluntary act, the very condition from which he would, but for such act, have been entitled to treat himself as freed and discharged.

The result of this view of the case is that the decree of the Vice-Chancellor should be reversed, and the Plaintiffs' bill dismissed with costs.

Solicitors for Appellant: *Coode, Kingdon, & Cotton*, agents for *T. Floud, Exeter.*

Solicitors for Plaintiffs: *Vizard, Crowder, & Anstie*, agents for *Holman & Bath, Glastonbury.*

Solicitors for other parties: *Dobinson & Geare*, agents for *Geare, Tozer, & Geare, Exeter; Yarde & Loader*, agents for *W. Huggins, Exeter.*

Ex parte TURQUAND. *In re* FOTHERGILL.

C. A. 1876 May 19, 26.

Surety—Acceptor of Accommodation Bills—Scheme of Arrangement—Debentures issued to Creditors—Bankruptcy Act, 1869, *s.* 28.

The creditors of a firm of liquidating debtors agreed to a scheme of arrangement under the 28th section of the *Bankruptcy Act*, 1869, which was sanctioned by the Court. Under this scheme the assets were transferred to a company, who were to carry on the business, and debentures were issued to the creditors for the amount of their proved debts, which were to be payable out of the surplus profits, after meeting certain prior charges. Among the creditors was *C.*, who had accepted accommodation bills to a large amount for the firm, and who afterwards himself filed a liquidation petition, and paid his creditors a composition of 4*s.* in the pound. The holders of the bills thus accepted proved against *C.*'s estate, and received their composition amounting altogether to about £32,000. They also proved against the estate of the liquidating firm under the scheme of arrangement. Some of them received the composition before proving, and consequently only proved for 16*s.* in the pound; the others proved for the whole amount. *C.* then claimed to stand in the place of the bill-holders as a creditor of the liquidating firm to the extent of what he had paid under the composition, and to have debentures issued to him to the nominal amount of £32,000 in their stead. His claim to stand in the place of those bill-holders who had

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received their composition before proving under the scheme of arrangement to the extent of 4*s.* in the pound was allowed; but as to the others who had proved for the whole amount:—

Held, first, that the debentures were not issued to the creditors in satisfaction of their debts, but in substitution for the dividends which under a bankruptcy would have been payable on them:

Secondly, that the scheme of arrangement made no difference in the relation between *C.* and the liquidating firm, namely, that of surety and principal debtor, and therefore that he had no equity to receive anything out of these assets till the creditors had been actually paid 20*s.* in the pound. His claim to debentures in respect of that part of composition was consequently disallowed.

Statement.

THIS was an appeal from an order made by Mr. Registrar *Brougham*, sitting as Chief Judge in Bankruptcy, in the liquidation of Messrs. *R. Fothergill* and *E. T. Hankey*.

The liquidating debtors were ironmasters and colliery proprietors trading at *Aberdare* under the name of the *Aberdare Iron Company* and the *Plymouth Iron Company*. On the 5th of June, 1875, they filed a petition for liquidation by arrangement, which was agreed to by the creditors, and Mr. *W. Turquand* was appointed trustee.

There were two large mortgage debts secured on the *Aberdare* and *Plymouth* works of the debtors, and unsecured debts amounting to about £900,000. The assets available for the payment of the unsecured creditors did not exceed £15,000.

Under these circumstances the creditors, under the provisions of the 28th section of the *Bankruptcy Act*, 1869, on the 4th of December, 1875, passed a resolution assenting to a general scheme of arrangement of the affairs of the debtors, and that on the approval of the scheme by the Court the discharge of the debtors should be granted. A similar resolution was passed by their separate creditors on the 14th of December, and the scheme was approved by the Court of Bankruptcy on the 29th of December.

The scheme was in substance as follows:—

The assets were to be handed over to a company called the *Aberdare and Plymouth Company, Limited*, formed to continue the business.

The mortgage debts were to be paid off by annual instalments out of the profits of the company. Fresh working capital to the amount of £36,000 was to be advanced by Mr. *W. S. Roden*, which

sum was to be secured by the issue of A debentures of the company bearing interest at £5 per cent.

The company was to issue to each of the joint creditors (other than the said mortgagees) B debentures of the company for the amount for which such creditor had proved or should prove in the matter of the said liquidation, but not including any interest after the 5th of June, 1875.

The new company was registered on the 8th of December, 1875.

By the articles of association it was provided by clause 33 that the A debenture debt should not exceed £36,000, and should be represented by A debentures on the terms therein mentioned; and by clause 34 that the B debenture debt should not exceed the debt proveable for principal and interest by the creditors of the former owners of the *Aberdare* property and the *Plymouth* property in the said liquidation, and should be represented by B debentures on the terms set forth in the 4th and 5th schedules thereinafter written, and should be issued to the said creditors.

The 4th schedule contained the form of one of the B debentures, in which it was stipulated that the company were bound to apply all the net profits of the company (after setting apart a sufficient amount to pay certain annuities amounting to £600 and the yearly instalments of the mortgages, and the yearly sum of £1800 for interest on the A debenture debt) to the payment on account of the B debenture debt of sums to the holders of the said debentures *pari passu*. And it was stipulated that the sum thereby secured was payable only by such surplus profits as aforesaid, or on the winding-up of the company (except as to any sum which might be paid out of other sources at the option of the company), and that the holder of the debentures should accept payment by such instalments as the company should think fit on such notice as therein mentioned, and that the said sum should not bear interest. The company thereby charged their undertaking, and all the property, assets, and effects thereof, with the moneys secured by the debentures subject to the prior charges; and it was also provided that until the winding-up of the company the holders of the B debenture debt should have a right to the application of profits in payment to them as aforesaid, in priority to the payment of principal moneys on account of the A debenture debt.

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Statement.

The 5th schedule contained regulations as to meetings, accounts, and other matters to be observed as between the holders of the different classes of debt of the company.

Among the joint creditors of *Fothergill & Hankey* was Mr. *E. Corry*, a metal merchant, who had accepted for their accommodation bills to the amount of more than £160,000. He filed a liquidation petition on the 4th of June, 1875, and on the 10th of August his creditors agreed to a composition of 4*s.* in the pound. The holders of the bills accepted by him proved in his liquidation, and he paid composition to them to the amount of about £32,350.

The bill-holders also proved in the liquidation of *Fothergill & Hankey*, the drawers of the bills, and applied for B debentures corresponding with their proofs. Of these bill-holders, some, namely, the *London and Westminster Bank*, the *Union Bank of London*, the *London Joint Stock Bank*, Messrs. *Richardson*, Messrs. *Glyn, Mills, & Co.*, the *Alliance Bank*, and the *National Bank of Scotland*, had received nothing under *Corry's* composition before making their proof, and therefore proved for their whole debt; while others, namely, the *West of England and South Wales Discount Bank*, the *City Bank*, Messrs. *Gurney & Co.*, and the *National Discount Company*, had received 4*s.* in the pound upon their proof, and therefore proved for 16*s.* in the pound on the amount of their debts.

Corry now claimed to be entitled to stand in the place of the bill-holders to the extent of 4*s.* in the pound, and to receive B debentures to that amount in their stead. Mr. Registrar *Brougham* sitting for the Chief Judge, made an order that *Corry* should be at liberty to prove against the estate of *Fothergill & Hankey* for £9825, the amount of the composition paid to the *West of England* and the other firms who had proved for 16*s.* in the pound, and that, with respect to the proofs by the *London and Westminster Bank* and other firms who had proved for the whole amount of their debts, *Corry* was entitled to stand in the place of the said several creditors to the extent of 4*s.* in the pound on the amount of their several debts, and to receive B debentures to the amount of the said composition of 4*s.* in the pound, being about £22,525.

From this decision the bill-holders, in the name of the trustee in the liquidation, appealed.

During the progress of the argument it was conceded by the Appellants that Mr. *Corry* should be permitted to prove for £9825, being the amount of composition paid by him to bill-holders before tendering their proof, and the decision was therefore confined to the remaining sum of £22,525.

Argument.

Benjamin, Q.C., and *Everitt* (*Horton Smith* with them), for the Appellant:—

Mr. *Corry* is in the position of a surety for *Fothergill & Hankey*, and is not entitled to receive anything from their estate till all the bill-holders have received 20*s.* in the pound. He cannot compete with his own creditors. The debentures may never produce 16*s.* in the pound; and at any rate, until they do, Mr. *Corry* can have no right to stand in their place: *Ex parte Marshall* (1); *Ex parte Turner* (2); *Gray* v. *Seckham* (3). The sale to the company was nothing more than a mode of realizing the assets. The debentures which each creditor was to receive were only a certificate of his share in the assets.

Roxburgh, Q.C., and Sir *H. Jackson*, Q.C. (*E. Corry* with them), for the Respondent, Mr. *Corry*:—

The creditors took the debentures in satisfaction of their debts. The question is not what they are really worth, but what the nominal value was at which the creditors took them. We say they took them as representing 20*s.* in the pound. The scheme of arrangement was a general bargain between all parties interested; and by that bargain a nominal value was placed upon the shares, and that must be considered their value. They may be assigned, and at some future time the holders may actually receive 20*s.* in the pound. In that case *Corry* will have lost his remedy unless his right to have debentures is now acknowledged.

Judgment, James, L.J.

JAMES, L.J.:—

I am of opinion in this case that the order of the Registrar must be discharged. The provisions in the Act of Parliament were not intended to alter the rights as between a principal creditor and a debtor. We held, in a case relating to a composition with creditors,

(1) 1 Atk. 129. (2) 3 Ves. 243. (3) Law Rep. 7 Ch. 680.

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that because a composition was voted for that did not in any way tend to release the debtor, and that case involved the same points which are involved in this.

In this case the Act of Parliament has said, amongst other things, in sect. 27, that, instead of ordering a dividend, if you find it is not convenient to release the debtor in a particular way, you may divide the assets between the creditors; or, instead of that, by the 28th section you may do that which is equivalent, you may make an arrangement for giving something to the creditors for settling the affairs of the debtor; but that is not by way of payment of a debt, or security for or satisfaction of the debt; it is a mere substitute for the dividend which he would have been compelled to pay if the ordinary administration had been followed. The provision for enabling that to be done instead of dividing the estate, could not have been intended by the Legislature to be for the benefit of a surety who had not paid the debt himself. In this case the surety has paid 4*s.* in the pound; what is his equity against the creditor before he has paid 20*s.* in the pound? When he has paid 20*s.* in the pound he may say, "Give me up the security which you have got." But he is not now in that position.

It is said there is a debenture for the amount, but that is a thing payable in a most remote and improbable contingency, and you cannot say that was in substance a satisfaction of the debt so as to release the debtor. The estate therefore stands, in my mind, exactly as it did before.

Mellish, L.J.

MELLISH, L.J.:—

I am of the same opinion. It is perfectly clear that if bills are discounted in the market which are drawn by one firm upon another firm, and then both those firms become bankrupt or go into liquidation by arrangement, or agree to a composition, the bill-holder is entitled to prove against both estates and to receive all the dividends or composition he can get from both estates until he has received 20*s.* in the pound, and whether it may turn out that the drawer is surety for the acceptor or the acceptor is surety for the drawer, yet the surety has no right to receive anything until the bill-holder has received 20*s.* in the pound. There-

fore it is perfectly clear that if *Fothergill & Hankey's* estate had been wound up in bankruptcy, or liquidation or composition, and 20*s.* in the pound had not been realized, the holders of the bills would have been entitled to have kept the 4*s.* in the pound they had got from *Corry* as well as the amount of the dividend or composition they got from *Fothergill & Hankey*. Then the sections of the *Bankruptcy Act* which have been referred to allow creditors to make, even after a liquidation, either a composition with the debtor, or to make what is described as an arrangement of the affairs of the debtor. Supposing they choose to make an arrangement of the affairs of the debtor, and the majority bind the minority to enter into that arrangement, then, in my opinion, the equity of the surety in an arrangement which will probably produce more than 20*s.* in the pound to the principal creditor is this—he may make up 20*s.* in the pound to the creditors, and take the arrangement in the place of the principal creditor. In that case he gets the debentures, and in my opinion that secures him against any injustice. Let me suppose in this instance that *Corry*, instead of paying 4*s.*, paid 18*s.* in the pound, so that he had a substantial interest in these debentures, then he could have said, "There is your remaining 2*s.* in the pound; give me the debentures." Or possibly he might say, "Your right is only to get 20*s.* in the pound. These debentures are now saleable for 5*s.* in the pound in the market; go and sell them, and take 2*s.* in the pound to make 20*s.*, and give me 3*s.*" In that way he would get perfect justice; therefore there is no difficulty in seeing that perfect justice is done to the surety. In point of fact, this estate is so insolvent that it is plain he could never get anything if it is wound up in the ordinary way.

Judgment, Mellish, L.J.

BAGGALLAY, J.A.:—

Baggallay, J.A.

I am of the same opinion. The effect of the Registrar's order is to give Mr. *Corry* part of the profits which properly belong to the bill-holders, and to which they are fairly entitled. It seems to me that the substantial question in the case is as to the true construction of the scheme, which appears to have been duly approved by the Court under the 28th section of the *Bankruptcy Act*, 1869. I must confess that for some time I felt strongly impressed with

C. A. 1876 *Ex parte* TURQUAND. *In re* FOTHERGILL. Judgment, Baggallay, J.A.

the view that the debentures were given in satisfaction of the debts, and if they had been paid-up shares instead of debentures, I should have remained of that opinion; but as the argument proceeded I was struck by the difference between the two. If shares had been accepted, they would have been taken for better or worse; they might have turned out to be of larger or less value, but by accepting these debentures the creditors took that which could not go for more than their amount in any case, and which would in this case have resulted in very much less; therefore I am not inclined to keep to the view I first took in the matter, especially as the Lords Justices have adopted a different view from that which I had adopted.

Solicitors for Appellant: *Lyne & Holman.*
Solicitors for Respondent: *Wansey & Bowen.*

C. A. 1876 C. J. B. *April* 10. C. A. *June* 2.

Ex parte DODD. *In re* ORMSTON.

Petition for Adjudication—Evidence in Support—Bankruptcy Rules, 1870, *rr.* 36, 37, 38.

A creditor filed a petition for adjudication, with the usual affidavit verifying the statements of the petition. The debtor gave notice of his intention to dispute the statements in the petition, and attended at the hearing but did not tender any evidence. The Registrar accordingly made an order of adjudication without further evidence on behalf of the creditor than the affidavit filed with the petition:—

Held (affirming the decision of *Bacon*, C.J.), that the statements in the petition ought to have been proved afresh; and that the adjudication must be annulled.

Statement.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy, annulling the adjudication of *Mark Ormston.*

On the 26th of January, 1876, *Ormston* was served with a debtor's summons by Messrs. *Dodd & Atkinson*, in the *Durham* County Court at *Stockton-on-Tees*, claiming a debt of £508. The debt not being satisfied, a petition for adjudication of bankruptcy was served on *Ormston* on the 18th of February, the act of bankruptcy relied on being that he had failed to comply with the debtor's summons.

Statement.

On the 24th of February, under the provisions of rule 36 of the Bankruptcy Rules, 1870, *Ormston* gave notice to the Registrar of his intention to dispute the statements in the petition, accompanied by an affidavit in support of the notice, in which he admitted that the debt had been incurred, but claimed a set-off, alleging there was a balance in favour of himself. He, however, omitted to comply with the terms of the rule, which directs that a copy of the notice shall be transmitted to the petitioning creditors three days before the petition is heard.

On the 1st of March the parties appeared before the Registrar, but the hearing was adjourned, in consequence of the irregularity as to the service of the notice, till the 10th. The debtor served a fresh notice on the Registrar on the 7th, and served the Petitioners by post on the 8th. On the 10th the case was again adjourned by consent to the 16th.

On the 16th of March *Ormston* appeared with his witnesses; but his solicitor, who had all his papers, not being present, he did not examine them or attempt to prove his objections; and when the hour of closing the Court arrived, the Registrar, on the application of the petitioning creditors, made an order adjudicating *Ormston* a bankrupt.

The Registrar made the order on the production of the petition for adjudication and the usual affidavit verifying the statements which accompanied it; but no witnesses were examined or additional affidavits filed on behalf of the petitioning creditors.

The debtor appealed from the order of adjudication to the Chief Judge, and the case came on to be heard on the 10th of April, 1876.

Argument.

Horton Smith, for the Appellant, contended that the debt had not been sufficiently proved. The Registrar ought at all events to have adjourned the case till the solicitor could attend. He referred to the *Bankruptcy Act*, 1869, s. 8; the Bankruptcy Rules, 1870, rr. 36, 37, 38; and to *Ex parte Boss* (1), *Ex parte Lindsay* (2), and *Ex parte Phillips* (3).

Doria, for the petitioning creditors, argued that under the cir-

(1) Law Rep. 18 Eq. 375. (2) Law Rep. 19 Eq. 52.
(3) 44 L. J. (Bkcy.) 11.

C. A. 1876 *Ex parte* DODD. *In re* ORMSTON.

cumstances of the case the debt had been sufficiently proved. The debtor was present and might have called his witnesses, and he had in fact admitted in his affidavit that some debt was due. The requirement of the rule as to service of the notice of intended objection had not been formally complied with.

Judgment, C. J. B.

BACON, C. J., said that he was clearly of opinion that there was not sufficient proof of the petitioning creditor's debt. The appeal must therefore be allowed, and the matter must go back to the County Court.

C. A.

The petitioning creditors appealed from this decision. The appeal was heard on the 2nd of June, 1876.

Argument.

Roxburgh, Q.C., and *Doria*, for the Appellants, contended that as the debtor had not produced any evidence in opposition to the petition it was the same as if he had not opposed it, and the Registrar was justified in making the order on the affidavit which had been filed when the petition was presented. There had been no case before the Court of Appeal in which it had been held that when the debtor did not oppose the petition it was necessary to prove the debt over again. They referred to the *Bankruptcy Act*, 1869, s. 8, and the Bankruptcy Rules, 1870, rr. 36, 37, and 38.

Horton Smith, for the debtor, was not called on.

Judgment, C. A. James, L.J.

JAMES, L.J., said that there could not be a doubt that the Chief Judge's order was right. The debtor had given notice of his intention to dispute the statements in the petition, and appeared at the hearing. The appeal must be dismissed with costs.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors: *J. W. Hickin*, agent for *Simey, Sunderland; J. E. Fox & Co.*

Ex parte FENNING. *In re* WILSON & ARMSTRONG.

C. A.
1876
June 2.

Bankruptcy—Liquidation—Appointment of Trustee more than Six Months after the Filing of Petition.

A debtor who traded both in *London* and *Scotland* presented a petition for liquidation in *England* on the 12th of July. The first meeting of his creditors was held, but was adjourned without passing any resolution till the 10th of February, in order to await the result of certain proceedings in *Scotland*. The English creditors met on the 10th of February and passed a resolution for liquidation and appointed a trustee :—

Held, that the appointment of the trustee, being more than six months after the filing of the petition, was void, and that the Registrar was right in refusing to register the resolution.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, sitting as Chief Judge.

George Wilson and *Walter Armstrong* carried on business in partnership as woollen manufacturers in *London*.

They also carried on business at *Hawick*, in *Scotland*, in partnership with *C. J. Wilson* and *G. M. Wilson*.

On the 12th of July, 1875, the Scotch firm was adjudicated bankrupt in *Scotland;* and also each of the partners, except *Armstrong*, was separately adjudicated bankrupt, and their estates sequestrated, and Mr. *T. S. Lindsay* was appointed trustee.

On the same day, the 12th of July, *G. Wilson* and *W. Armstrong* filed a liquidation petition in the *London* Bankruptcy Court.

The first meeting of creditors in *London* was held on the 10th of August, and was then adjourned for six months, till the 10th of February, 1876. The object of the adjournment was to wait for the determination of the Scotch Courts upon the question whether the estate of the *London* firm of *Wilson & Armstrong* belonged to the trustee of the Scotch bankruptcy, which depended on the question whether there were in fact two separate firms or one firm only.

On the same day, the 10th of August, a separate petition for adjudication was filed in *Scotland* against *W. Armstrong*, under which he was adjudicated bankrupt on the 17th of August, and *T. S. Lindsay* was appointed trustee of his separate estate.

C. A. 1876 — *Ex parte* FENNING. *In re* WILSON & ARMSTRONG.

Statement.

On the 10th of February, 1876, the adjourned meeting under the *London* liquidation was held, but none of the joint creditors of the firm attended, and the proceedings for the joint liquidation terminated. The separate creditors of *Armstrong*, however, passed resolutions agreeing to a liquidation, and appointing a trustee, and granting the debtor his discharge.

The Registrar, Mr. *Keene*, refused to register these resolutions, on the ground that all the estates, both joint and separate, were vested in the Scotch trustee, and that there was no estate for liquidation in the *London* Court. This decision was affirmed by Mr. Registrar *Pepys*, sitting as Chief Judge. Some of the separate creditors of *Armstrong* appealed from this decision.

Argument.

Crump and *Northmore Lawrence*, for the Appellants, contended that the appointment of the trustee by the separate creditors of *W. Armstrong* was equivalent to an adjudication in bankruptcy, and the title of the trustee dated back to the presentation of the petition for liquidation, which was an act of bankruptcy committed within twelve months before that time. It had, therefore, priority over the title of the trustee in the Scotch bankruptcy, which commenced on the 10th of August. They referred to the *Bankruptcy Act*, 1869, ss. 6, 11, 125, sub-s. 7, and to *Ex parte Eyles* (1).

Finlay Knight (*Benjamin*, Q.C., with him), for the Scotch trustee, was not called on.

Judgment, James, L.J.

JAMES, L.J.:—

When we look at the words of the Act it is clear that the estate in this case is vested in the trustee under the Scotch bankruptcy. The trustee in a liquidation has the same right as a trustee in bankruptcy. He can have no higher rights. By the 7th sub-section of the 125th section the appointment of a trustee under a liquidation is made equivalent to an adjudication of bankruptcy. But an adjudication of bankruptcy could only have been made under an act of bankruptcy committed within six months. Therefore, independently of all other considerations which might make

(1) Law Rep. 16 Eq. 99.

the Court reluctant to support this liquidation, the resolution could have no power to vest anything in the trustee. The creditors chose to adjourn the meeting for six months; and then it was too late to appoint a trustee. The appeal must be dismissed with costs.

C. A. 1876 *Ex parte* FENNING. *In re* WILSON & ARMSTRONG.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors: *A. Crump & Son; Stevens, Wilkinson, & Harries.*

Ex parte THORNE. *In re* JONES.

C. A. 1876 *June* 2.

Bankruptcy—Trader—Keeper of a Lodging and Boarding House—Professional Nurse—Bankruptcy Act, 1869, *sched.* 1.

A professional nurse, who kept a lodging house for invalids and supplied them with board at a profit, as well as lodging and nursing:—

Held, to be a keeper of an "hotel," and therefore a trader within the *Bankruptcy Act*, 1869.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, sitting as Chief Judge in Bankruptcy.

On the 7th of March, 1876, Messrs. *Atkinson & Co.* obtained a judgment against Miss *Rebekkah Jones*, who kept a lodging-house for invalids in *Wimpole Street*, for £176, being the price of furniture supplied to her. On the same day they issued execution against her. On the 8th of March Miss *Jones* filed a liquidation petition in which she described herself as a "lodging-house keeper and nurse." A receiver was at once appointed, and an interim injunction obtained to restrain the execution. It appeared from the affidavit and the examination of Miss *Jones*, that she was a professed nurse, having been specially trained as such, and that she had opened a house for the reception of invalids who were recommended to her by medical men and others; and that she supplied provisions for her lodgers, on which she made a profit, and also superintended their nursing. She was not described in the *London* Directory as a lodging-house keeper, nor did she take in persons who were not invalids, except under special circumstances. The

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Ex parte THORNE. *In re* JONES.

creditors having agreed to a liquidation, and appointed a trustee, the trustee applied for an order declaring that the goods seized by Messrs. *Atkinson* were the property of the trustee, and that the injunction might be made perpetual against the execution creditor, which Messrs. *Atkinson* opposed, on the ground that Miss *Jones* was not a trader within the bankruptcy laws, and therefore the execution was not an act of bankruptcy.

The Registrar having made the order applied for, the execution creditors appealed from his decision.

Argument.

H. M. R. Pope, for the Appellants:—

The description of traders in the schedule to the *Bankruptcy Act*, 1869, enumerates "keepers of inns, taverns, hotels, or coffee houses." If the debtor does not come within one of these classes she is not a trader. It is true that in *Smith* v. *Scott* (1) it was decided that a lodging-house keeper who made a profit by supplying his lodgers with provisions was an "hotel keeper" and a trader under the bankruptcy laws then in force, but the mere keeping of a lodging-house is not "trading": *Ex parte Bowers* (2); and if the selling of provisions is merely ancillary to another occupation which is itself not trading, the case is not within the Act: *In re Cleland* (3). A schoolmaster, or the keeper of a lunatic asylum, is not a trader, although he makes a profit by the provisions which he supplies to those under his care. In the present case Miss *Jones* was a professional nurse, and the boarding of her patients was only ancillary to the exercise of her occupation.

De Gex, Q.C., and *H. W. Lord*, for the trustee, were not called on.

Judgment, James, L.J.

JAMES, L.J.:—

I am of opinion that it is quite impossible to draw the distinction contended for. It is impossible to adopt a different construction from that put by the Courts on the words "keepers of hotels." By deliberately using the same words in the present Act, after the Courts had put a certain construction on them, I think the Legislature must be taken to have adopted that construction. It is

(1) 9 Bing. 14. (2) 3 Mont. & A. 33.
(3) Law Rep. 2 Ch. 466.

C. A. 1876 *Ex parte* THORNE. *In re* JONES.

therefore settled that a keeper of a lodging-house, who also supplies board, is an hotel keeper within the *Bankruptcy Act*. Does it make any difference that the lodging-house keeper only takes a particular class of persons? In the present case the debtor had a connection among medical men and other persons who recommended to her lodgers who required peculiar care and attention. That fact cannot make any difference. It is quite a different case from that of a schoolmaster or the keeper of a lunatic asylum. She is simply a lodging and boarding-house keeper, and her occupation as a nurse is only ancillary to that business. The appeal must be dismissed with costs.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors: *Barnard & Co.; Paterson, Sons, & Garner.*

In re WOODS. *Ex parte* DITTON.

C. A. 1876 *July* 27.

Leasehold Interest of Bankrupt—Disclaimer by Trustee—Leave of Court—Appeal presented after Execution of Disclaimer—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 23—*Bankruptcy Rules*, 1870, *r.* 143—*Bankruptcy Rules*, 1871, *r.* 28.

7 Ch D 129 11 Ch D 58 6 QB D 374 7 QB D 526 19 Ch D 122 123-4

On the application of the trustee in a bankruptcy leave was given to him to disclaim a lease which was vested in the bankrupt. The trustee executed a disclaimer, and after this had been done, but within the time allowed for bringing an appeal, a person with whom the bankrupt had deposited the lease by way of equitable mortgage, and who was present when the order giving the leave to disclaim was made, gave notice of appeal from the order:—

Held, that, the disclaimer having been executed, the lessor's title was complete; and the appeal was dismissed.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, sitting as Chief Judge in Bankruptcy.

William Woods, *Edward George Woods*, and *Henry Woods*, club proprietors, of the *City United Club*, *Ludgate Circus*, were adjudicated bankrupts on the 13th of July, 1875, and *William Edwards* was appointed trustee of their property. The lease of the premises where the debtors carried on their business had, on the 1st of April, 1875, been deposited by them, by way of equit-

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In re WOODS. *Ex parte* DITTON.

able mortgage, with Mr. *A. G. Ditton*, their solicitor, as a security for an advance of £220 and costs due from them to him.

Ditton filed a bill in Chancery against the trustee, and an injunction was granted by the Court of Bankruptcy to restrain the proceedings in the suit. This order was afterwards modified by the Court of Appeal: *Ex parte Ditton* (1).

Statement.

Negotiations took place between the trustee and *Ditton* with a view to the settlement of his claim, and the delivery up of the lease, so as to enable the trustee to sell the property. Considerable delay took place owing, as the trustee alleged, to the unreasonable demands of *Ditton*, and ultimately the trustee applied to the Court for leave to disclaim the lease, and on the 25th of May, 1876, the Registrar made an order that the trustee should be at liberty at any time within one month from the date of the order to disclaim all the estate and interest of the bankrupts acquired by the trustee in the lease. This order was made in the presence of *Ditton* and of the lessor. On the 13th of June the trustee executed a disclaimer of the lease, and notice of the disclaimer was served upon the landlord and upon *Ditton*. Upon the 15th of June *Ditton* gave notice of appeal from the Registrar's order.

Argument.

De Gex, Q.C., and *Warmington*, for the Appellant:—

The trustee cannot by disclaiming deprive the Appellant of his rights. The trustee cannot disclaim without the leave of the Court: Bankruptcy Rules, 1871, r. 28; and the appeal is from the order which gave the leave.

Winslow, Q.C., and *Bigham*, for the trustee:—

The disclaimer was executed with the leave of the Court before any notice of appeal was given, and the estate of the bankrupts is at an end, just as if the lease had been surrendered.

T. A. Roberts, for the lessor.

Judgment, James, L.J.

JAMES, L.J.:—

The disclaimer having been executed, the lessor's title to the property is complete. We have no power to help you. You

(1) 1 Ch. D. 557.

should have applied to have the execution of the order stayed pending an appeal. The appeal must be dismissed with costs.

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MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors for Appellant: *Wild, Barber, & Browne.*
Solicitors for Trustee: *Pritchard, Englefield, & Co.*
Solicitor for Lessor: *Badham.*

In re DAVIES. *Ex parte* KING.

C. A. 1876 *July* 27.

Bankruptcy Petition—Use for inequitable Purpose—Power of Court to refuse to adjudicate.

When the Court sees that a bankruptcy petition has been made use of for an inequitable purpose, as, for instance, to extort money from the debtor, it will refuse to make an adjudication, even though there is a good petitioning creditor's debt, and an act of bankruptcy has been committed.

12 Ch D 482
14 Ch D 718

Statement.

THIS was an appeal from a decision of Mr. Registrar *Brougham*, sitting as Chief Judge in Bankruptcy.

On the 29th of June, 1875, a bankruptcy petition was presented by *R. A. King* against *John Davies*. The debt alleged was a sum of £176 4*s*. in respect of a bill of exchange for £175 which had been indorsed by *Davies* to *King*, and which had been dishonoured at maturity. The act of bankruptcy alleged was that *Davies* had failed to comply with the requirements of a debtor's summons served on him by *King* in respect of the debt.

By an affidavit of the Petitioner's solicitor it appeared that, in July, 1875, at the urgent request of a Mr. *Peckhover*, who stated that *Davies* was without the means of paying any money on account of the bill for £175, he (the solicitor) agreed to stay proceedings on the petition for three months from the 16th of July, 1875, "upon receiving £15 in cash for expenses out of pocket in presenting petition, and upon receiving a further bill indorsed by *Davies* for £85 for expenses and bonus for the delay." The £15 was paid, and the bill for £85 was given, but it was dishonoured when it became due on the 19th of October, 1875. By the same

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In re DAVIES. *Ex parte* KING.

Statement.

affidavit it appeared that on the 26th of November, 1875, a similar arrangement was made by *King's* solicitor. He then agreed, on receiving an acceptance of *Davies* for £100, to adjourn the petition generally, on the understanding that it would be replaced in the paper upon the 5th of January, 1876. A letter written by the solicitor stated that "the £100 is accepted, as to £70, part thereof, as a consideration for the adjournment, and for expenses which may be up to this date due from *Davies* to *King;* and as to £30, the remainder thereof, as a part payment of *Davies'* acceptance for £85 overdue." The bill for £100 was paid by *Davies* on the 1st of April, 1876. The petition was afterwards brought to a hearing on the 27th of June, 1876. *Davies* then alleged that the bill for £100 was paid on account of the £175, and that he knew nothing of the letter written by *King's* solicitor in November. The Registrar ordered that on *Davies* within forty-eight hours paying to *King* £76 4s., and depositing in Court £100 to provide for the costs of the petitioning creditor, and on payment of any further costs found due upon taxation, the petition should be dismissed.

From this order *King* appealed.

Argument.

Roxburgh, Q.C., and *Yate Lee*, for the Appellant:—

The debtor having made default, in complying with the debtor's summons, the creditor was entitled to an adjudication as a matter of right. Other debts being due to him, he is not bound to be content with payment of the debt for which the summons was issued: *Ex parte Boss* (1). Proceedings in bankruptcy are for the benefit of all the creditors: *Ex parte Jay* (2).

De Gex, Q.C., and *Finlay Knight*, for the debtor, were not called upon.

Judgment, James, L.J.

JAMES, L.J.:—

I am of opinion that the Registrar was well warranted in refusing to adjudicate upon this petition. To my mind it is quite shocking that proceedings in bankruptcy should be used as a means of extorting money from a debtor by way of what is called

(1) Law Rep. 18 Eq. 375. (2) Law Rep. 9 Ch. 133.

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1876
In re DAVIES.
Ex parte KING.

a "bonus" for the adjournment of the hearing of the petition. By the affidavit of the Petitioner's solicitor it appears that two such bonuses have been extorted in the present case. It would be a shocking thing if after this an adjudication could be made and all the debtor's transactions impeached. It has been suggested that the petitioning creditor did not himself authorize these arrangements, but that they were made by his solicitor without his knowledge. That gives a much more serious aspect to the matter, and it is unnecessary for me to say what the consequences to the solicitor might be. The appeal must be dismissed with costs.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors: *J. Wilson Heritage; Ingledew, Ince, & Greening.*

In re SNEEZUM. *Ex parte* DAVIS.

C. A.
1876
C. J. B.
June 19.
C. A.
July 27.

Contract of Bankrupt — Disclaimer by Trustee — Provable Debt — Discharge of Bankrupt — Continuing Contract — Omission of Trustee to disclaim — Performance for a Time — Subsequent Repudiation — Damages occasioned by Breach — Personal Liability of Trustee — Proof against Bankrupt's Estate — Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 22, 23, 24, 25 (*sub-s.* 2), 31, 49, 83 (*sub-s.* 7).

If the trustee of a bankrupt, when called upon to decide whether he will disclaim a continuing contract of the bankrupt, does not disclaim it, but carries it on for the benefit of the estate, he is still at liberty, when he finds it unprofitable, to cease to perform it, and in that case the other party to the contract is entitled, under sect. 31 of the *Bankruptcy Act*, 1869, to prove against the bankrupt's estate for the damages occasioned by the breach of the contract, and this is his only remedy.

The trustee does not by not disclaiming adopt the contract, either personally or on behalf of the estate.

5 Ch. D. 250
25
5 Ch. D. 161
162
170
17 Ch. D. 749
9 Q.B.D. 479
Statement.
480, 486
493
10 Q.B.D. 25
27
11 Q.B.D. 96

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

William Sneezum was a railway waggon builder at *Cardiff*. On the 4th of February, 1873, he filed a liquidation petition in the *Cardiff* County Court, under which his creditors resolved upon a

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In re SNEEZUM. *Ex parte* DAVIS.

Statement.

liquidation by arrangement, and appointed *James Murphy* and *Nelson Hewertson* trustees.

On the 1st of July, 1869, *Sneezum* had entered into a contract with the *Leeds Railway Plant Company, Limited*, to maintain and repair for them fifty railway waggons for a term of seven years from the 1st of July, 1869, and the same day he entered into a similar contract with the company to maintain and repair the fifty waggons for a further term of seven years from the 1st of July, 1876, at an annual payment of £1 10*s.* per waggon. The benefit of these contracts was assigned the same day by the company to Messrs. *Davis & Son*, colliery proprietors at *Cardiff*. On the 10th of September, 1872, *Sneezum* entered into another contract with *Davis & Son* to maintain and repair for them 100 waggons for seven years from the 1st of October, 1872, on similar terms.

On the 8th of March, 1873, the trustees disclaimed a contract which *Sneezum* had entered into on the 10th of January, 1873, with *Davis & Son* to build some waggons for them, and *Davis & Son* thereupon claimed to prove in the liquidation for damages occasioned to them by reason of the disclaimer. Ultimately this claim was compromised by the payment by the trustees to *Davis & Son* of a sum of £1750. On the 9th of April, 1873, *Davis & Son* gave the trustees notice in writing, under sect. 24 of the *Bankruptcy Act*, 1869, requiring them to decide whether they would disclaim the contracts of the 1st of July, 1869, and the 10th of September, 1872. The trustees gave no notice of disclaimer within the twenty-eight days fixed by sect. 24, and they in fact continued to perform these contracts until the 25th of January, 1875. On the 19th of June, 1873, *Davis & Son* applied to the County Court for an order to restrain the trustees from disposing of the estate of *Sneezum* without first giving security or providing for the carrying out of the contracts. The hearing of this application was adjourned *sine die*, with liberty to *Davis & Son* to renew it on giving four days' notice. On the 21st of January, 1875, the application was renewed, and an order was then made restraining the trustees from distributing the assets until further order. On the 25th of January, 1875, the trustees gave notice to *Davis & Son* that they disclaimed the contracts of the 1st of July, 1869, and the 10th of September, 1872, and that they should cease to perform them after

C. A. 1876 ~~ *In re* SNEEZUM. *Ex parte* DAVIS.

the 30th of January, 1875. On the 23rd of December, 1875, *Davis & Son* commenced an action in the Queen's Bench Division against *Murphy* and *Hewertson* for damages for breach of these contracts. On the 24th of May, 1876, on the application of the trustees, an order was made restraining *Davis & Son* from taking any further proceedings in the action. *Davis & Son* appealed to the Chief Judge. The appeal came on to be heard on the 19th of June, 1876.

Argument.

Finlay Knight, for the Appellants:—

Under the old law if the assignee adopted a contract of the bankrupt he adopted it with all its liabilities: *Gibson* v. *Carruthers* (1). By sect. 23 of the present Act the trustee is enabled to escape from an onerous contract by disclaiming it. But sect. 24 compels him to decide, if called on so to do, within twenty-eight days, or such further time as may be allowed by the Court, whether he will disclaim or not. There would be no meaning in this provision if the trustee, having once neglected to disclaim, could at any subsequent time do so. He must make up his mind once for all. If he does not disclaim, both sides are equally bound by the contract. The trustee is personally liable; he cannot play fast and loose with the contract.

[He referred to *Ex parte Llynvi Coal Company* (2); *Ex parte Waters* (3); *Ex parte Chalmers* (4).]

De Gex, Q.C., *Winslow*, Q.C., and *W. Bowen Rowlands*, for the trustees, were not called upon.

Judgment, C. J. B.

BACON, C.J.:—

No doubt a trustee in bankruptcy is entitled to the benefit of any beneficial contract which the bankrupt has entered into. Here, there being several contracts in existence at the time of the liquidation, and the present Appellants offering the trustees the option of adopting or rejecting them, the trustees say as to one of them, "We will have nothing to do with it;" and as to the others, "We will continue them." The Appellants were entitled

(1) 8 M. & W. 321, 333.
(2) Law Rep. 7 Ch. 28.
(3) Law Rep. 8 Ch. 562.
(4) Ibid. 289.

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to prove for damages for breach of the contract which the trustees repudiated; they did prove, and they received out of the estate the amount of those damages, and that contract was put an end to. The other contracts went on, and the trustees endeavoured to perform them. They had not to be performed once for all, but they were continuing contracts. They were performed until a time came when the trustees, finding that they could not, without disadvantage to the estate, continue to perform them, gave notice that they should cease to perform them. Then how are the Appellants injured? What damage have they sustained? The contracts are broken, and a right to damages arises, and the Appellants have as much right to prove for damages in respect of these contracts as they had in respect of the first, which was disclaimed. Then, what have the Appellants to complain of in the conduct of the trustees? What have the trustees done to mislead them? They had the benefit of the contracts up to January, 1875, and when that benefit ceased they were entitled to prove for damages against the estate. It would be a violation of justice and common sense to hold that the trustees, who have discharged a thankless duty, should, because they have performed the contracts for a certain time, be personally liable for not performing them any longer. The contracts having been performed up to a certain point, to that extent the Appellants have been benefited. I think they have no right to complain. The law affords them a complete remedy. They have, indeed, acquiesced in the proceedings, for, knowing that the trustees were going on with these contracts, they applied to the County Court for an order that there should be no distribution of the estate until their demand had been satisfied, and they obtained an order to that effect. What plainer evidence could be furnished that the trustees were dealing, not for their own benefit, but for the benefit of the creditors? The trustees acted in the matter according to what they considered the best mode of dealing in the interest of the estate. They neither accepted nor repudiated these contracts. As to the one which they did repudiate, the Appellants have had their remedy in damages. The trustees appear to have carried on the other contracts as much for the benefit of the Appellants as for the benefit of the estate, and they had a right to carry them on

without becoming personally liable. I am disposed to think that sects. 23 and 24 have no application to continuing contracts such as those now before me. But whether this be so or not, the order appealed from was, in my opinion, perfectly right; and although it has not in so many words said that the Appellants may prove for damages, I have no doubt that this would follow. The appeal proceeds upon an erroneous view of the law, and it must be dismissed with costs.

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From this decision *Davis & Son* appealed. The appeal came on to be heard on the 27th of July, 1876.

C. A.

Benjamin, Q.C., and *Finlay Knight*, for the Appellants:—

Argument.

We say that the question of liability would be most properly determined in the action, but we are willing that this Court should decide the matter. We do not contend that the trustees are personally liable on the contract, but that they are liable as representing the estate, *i.e.*, the creditors. By not disclaiming, the trustees, on behalf of the estate, adopted the contract with the Appellants on behalf of the estate, and the contract is subject to all the ordinary legal incidents. If it is broken, the estate must pay in full the damages occasioned by the breach before any dividend is distributed to the other creditors. By sect 23 of the *Bankruptcy Act*, 1869 (1), if the trustee disclaims the contract it

(1) Sect. 23 provides: "When any property of the bankrupt acquired by the trustee under this Act consists of . . . unprofitable contracts, . . . the trustee, notwithstanding he has endeavoured to sell, or has taken possession of such property or exercised any act of ownership in relation thereto, may, by writing under his hand, disclaim such property, and upon the execution of such disclaimer the property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication. . . . . Any person interested in any disclaimed property may apply to the Court, and the Court may, upon such application, order possession of the disclaimed property to be delivered up to him, or make such other order as to the possession thereof as may be just.

"Any person injured by the operation of this section shall be deemed a creditor of the bankrupt to the extent of such injury, and may accordingly prove the same as a debt under the bankruptcy."

Sect. 24: "The trustee shall not be entitled to disclaim any property in pursuance of this Act in cases where an application in writing has been made to him by any person interested in such property, requiring such trustee to decide whether he will disclaim or not,

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Argument.

is to be deemed to be determined as from the date of the adjudication, just as if the bankrupt were dead.

[MELLISH, L.J.:—How can the contract have been determined from the date of the adjudication, if the trustees have carried it on for two years? Under the old law the bankrupt would have remained personally liable on the contract.]

If the creditors adopt the contract it becomes theirs, not the bankrupt's. Sect. 25 (sub-sect. 2) enables the trustee to carry on the business of the bankrupt, and sect. 83 (sub-sect. 7) gives the trustee power to make contracts on behalf of the estate. The contract must be at an end or not; if it is disclaimed, there is an end of it; if the trustee does not disclaim within the time fixed by sect 24, the contract remains in force, and it remains with all its legal incidents; it cannot then be repudiated. Else what is the use of fixing the limit of twenty-eight days?

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and the trustee has for a period of not less than twenty-eight days after the receipt of such application, or such further time as may be allowed by the Court, declined or neglected to give notice whether he disclaims the same or not."

Sect. 25 provides: "Subject to the provisions of this Act the trustee shall have power (*inter alia*) (sub-sect. 2) to carry on the business of the bankrupt so far as may be necessary for the beneficial winding-up of the same."

By sect. 31: "Demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise shall not be provable in bankruptcy, and no person having notice of any act of bankruptcy available for adjudication against the bankrupt shall prove for any debt or liability contracted by the bankrupt subsequently to the date of his so having notice.

"Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the bankrupt is subject at the date of the order of adjudication, or to which he may become subject during the continuance of the bankruptcy by reason of any obligation incurred previously to the date of the order of adjudication, shall be deemed to be debts provable in bankruptcy, and may be proved in the prescribed manner before the trustee in the bankruptcy."

Sect. 83 provides: "The following regulations shall be made with respect to the trustee and committee of inspection (*inter alia*):—

"(7.) The trustee of a bankrupt may sue and be sued by the official name of 'the trustee of the property of a bankrupt,' inserting the name of the bankrupt, and by that name may hold property of every description, make contracts, sue and be sued, enter into any engagements binding upon himself and his successors in office, and do all other acts necessary or expedient to be done in the execution of his office."

[MELLISH, L.J :—The decision of the Chief Judge seems practically to do away with that limit.]

Ex parte Llynvi Coal Company (1) and *Ex parte Waters* (2) shew that the bankrupt is released from all personal liability on the contract. If the contract is not put an end to by a disclaimer, the estate must be liable on the contract as the contracting party. The creditors have elected to continue the bankrupt's business; they have had the benefit, and they must now accept the burden. In *Ex parte Chalmers* (3) it was held that a contract for delivery of goods by monthly instalments was not put an end to by the bankruptcy of the party to whom the delivery was to be made; but still it was held that the trustee could not insist on the performance unless he paid in full for the goods, and even paid for a monthly instalment which had been delivered but not paid for before the bankruptcy.

De Gex, Q.C., and *Winslow*, Q.C., for the trustees:—

There is nothing in the Act to attach any personal liability to the trustees; the bankrupt may have been freed from liability; it does not follow that a liability has been imposed on any one else.

[JAMES, L.J.:—It seems to me that the trustee in his official character, *i.e.*, the estate, becomes liable.

MELLISH, L.J.:—Sect. 23 applies also to leases held by the bankrupt, upon the covenants of which the assignee in bankruptcy would under the old law have been personally liable, so long as he remained lessee, though he could have got rid of the liability by assigning the lease.]

That was because of the privity of estate.

[MELLISH, L.J.:—My difficulty is that sect. 23 gives a right of proof against the estate when the trustee disclaims. Is there any such right when he does not disclaim?]

There is nothing in the Act to make a novation of the contract, nothing to make the trustee, either personally or in his representative character, a contractor. There is nothing to take away

(1) Law Rep. 7 Ch. 28. (2) Law Rep. 8 Ch. 562.
(3) Law Rep. 8 Ch. 289.

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the personal liability of the bankrupt; but sect. 31 makes that liability the subject of proof against the estate. Under the old law, as is shewn by *Gibson* v. *Carruthers* (1), an assignee in bankruptcy had a right to enforce or to abandon a contract of the bankrupt. There was no personal liability on the part of the assignee. If he abandoned the contract, the bankrupt remained personally liable. But now sect. 31 substitutes for that liability a right of proof against the estate. That is the only remedy for a breach of the contract. The bankrupt is the only person who has contracted; the trustee has entered into no contract. The judgment in *Ex parte Waters* (2) shews that there is a right of proof against the bankrupt's estate if a contract made by him is broken at any time during the continuance of the bankruptcy. Sect. 31 has substituted this right for the right to sue the bankrupt, which existed under the former law.

[MELLISH, L.J.:—Suppose that in consequence of the neglect of the trustee to keep one of the waggons in a proper state of repair an accident happened on the railway on which the waggon was travelling, who would be liable for the damage?]

That would be nothing more than a breach of the contract. It is the duty of the trustee to carry out the bankrupt's contracts if he thinks it will be beneficial to the estate to do so; but he derives no personal profit from it. That the trustee should be subject to a limited liability like that of an executor in respect of his testator's contracts, would be a complete novelty in bankruptcy. If the Act had intended to make such a provision, it would have been made expressly, not left to be implied. All the cases which have been referred to proceed upon this principle, that the object of the Act was to extend the release of the bankrupt, and at the same time to extend equally the right of proof against his estate. Sect. 49 releases the bankrupt from all debts and liabilities provable in the bankruptcy. If the debt or liability is not provable, then the bankrupt is not released from it. The observations of Lord Justice *Mellish* in *Ex parte Llynvi Coal Company* (3) shew that there is a right of proof in the present case.

(1) 8 M. & W. 321. (2) Law Rep. 8 Ch. 562.
(3) Law Rep. 7 Ch. 33, 34.

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Argument.

Benjamin, in reply:—

The argument is that we have a right to prove against the bankrupt's estate for a breach committed, not by the bankrupt, but by the trustees.

[JAMES, L.J.:—That it is in truth a breach committed by the bankrupt.]

Suppose the trustee carried on the business of a bankrupt for years, and retained the services of his manager, would not the manager be entitled to be paid his salary in full out of the assets? Provable debts are debts due at the date of the adjudication, or debts which become due afterwards in respect of contracts pending at that time. In respect of contracts which the trustee is entitled to disclaim, a right of proof is given by sect. 23; what was the necessity for that provision if there is a right of proof in any event? The trustee may now continue the bankrupt's business with a view to its beneficial winding-up; formerly the assignee could not do this without the assent of all the creditors. The condition of the bankrupt is fixed at the date of the adjudication. The creditors have the twenty-eight days to elect whether the contract shall be determined or not; if the trustee does not disclaim, he adopts.

[BAGGALLAY, J.A.:—May not the result be that, if the trustee does not disclaim, the old law is left unaltered?]

I contend that if the contract continues, it continues with mutuality.

[MELLISH, L.J.:—The parties might have made the contract determinable in the event of bankruptcy.]

The observations of *Rolfe*, B., in *Gibson* v. *Carruthers* (1) are in our favour.

Judgment, C.A.
James, L.J.

JAMES, L.J.:—

I am of opinion that the judgment of the Chief Judge, affirming the judgment of the County Court Judge, ought to be affirmed. No doubt there is great force in the argument which Mr. *Benjamin* has addressed to us, and possibly the Legislature

(1) 8 M. & W. 329.

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may be induced, upon consideration of many of the topics upon which he has dwelt, to alter the language of these sections of the Act. The state of the law before the Act of 1869 was certainly such that no claim like that which is now made by the Appellants could have been effectually asserted. Up to the time of the passing of the Act of 1869 assignees in bankruptcy could have gone on performing such a contract as this as long as they were minded to do so, and when they were no longer minded to perform the duty imposed by it, they might have discontinued it, and thereupon the bankrupt himself would have been liable. The performance of the bankrupt's contract by the assignee for a limited period did not relieve the bankrupt from his obligation, and the other contracting party, so long as the contract was fulfilled according to its terms, could not be heard to say that he would put an end to it. That was the state of the law at that time. Then, by the Act of 1869, the law was altered to a very considerable extent, so as to free the bankrupt from liability in respect of future breaches of contract, and to give the persons whose contracts were broken or put in jeopardy by reason of the bankruptcy a right to prove against the bankrupt's estate, instead of the personal liability of the bankrupt. Alterations have been introduced for that purpose, and the main provisions with which we have to deal are contained in sect. 23. [His Lordship read the section.] Mr. *Benjamin* was obliged to admit that in order to give effect to his argument he must contend that the true interpretation of this section is this—that we must, from the provision that upon the execution of the disclaimer by the trustee the contract is to be deemed to be determined from the date of the order of adjudication, imply that, if the contract is not disclaimed after notice from the other party, then it is to be deemed to have been adopted by the trustee upon the responsibility and at the expense of the estate. That is a provision which might perhaps be very properly made by the Legislature; but, to my mind, to insert it in this way by implication would not be to construe the Act of Parliament, but to alter it; it might be to improve it, according to the view which some persons take of the matter, but it would certainly be altering the Act of Parliament, and enlarging still further the provisions which the Legislature has thought fit to make with respect to such contracts. All we can

Judgment, C. A James, L.J.

say is that, except to the extent mentioned in the Act of Parliament, the law remains exactly as it was before; that is to say, that if the contract is not disclaimed by the trustee it is not determined. The result of that would be to leave the bankrupt liable for any future breaches; but that contingency seems to be provided for by sect. 31, which says in effect that, where there is a breach during the continuance of a bankruptcy of any contract which was made by the bankrupt before the bankruptcy, proof for the damage may be made exactly as if the breach had taken place before the bankruptcy. I am of opinion, therefore, that, having regard to sect. 31 as well as to sects. 23 and 24, the remedy of the Appellants is that which the Chief Judge and the County Court Judge have given them—that they have a right to prove in the liquidation in respect of the breach of contract, just as if the breach had occurred before the liquidation. And, as to sub-sect. 2 of section 25, that does not seem to me to carry Mr. *Benjamin's* argument to the extent which he wished. That does not give the trustee the power to carry on any contracts of the bankrupt, whatever may be their nature, for any time, but only to carry on the business of the bankrupt so far as may be necessary for the beneficial winding-up of the same. That is only a temporary provision until the trustee can dispose of the good-will. It does not appear to me that we can extend that clause so as to mean that the trustee may take upon himself the obligations of a contract which might last for seven or fourteen years.

Mellish, L.J.

MELLISH, L.J.:—

I am of the same opinion. I think that when the law as it existed prior to the passing of the Act of 1869 is really understood there will not be much difficulty in understanding what is the effect of the Act of 1869. It had been settled before that Act that the mere fact of one of two parties to a contract becoming bankrupt did not of itself put an end to the contract. No doubt the person who had contracted with the bankrupt was not bound to deliver goods to a man who had become insolvent unless he got paid for them beforehand, and a man who had agreed to do work and labour for a bankrupt—a foreman, for instance, who had been engaged for three years—was not bound to go on serving him

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without the prospect of getting paid. He would be entitled to say, "I cannot go on unless I am secured my wages." But, subject to that, the bankrupt's contract continued, and the assignee was always entitled to perform it, and so long as he performed it he got the entire benefit of it, but he might at any time stop. He might either not take up the contract at all, or he might take it up for a time, and then afterwards, if he found that it was not a beneficial contract, he might abandon it, and the other party had no remedy except to bring an action against the bankrupt personally to recover damages for the breach. That, no doubt, was a hard state of things, both on the person who had contracted with the bankrupt and on the bankrupt himself. Now, the question is, to what extent has that law been altered? and beyond all question, as we have already laid down in several cases, it has been altered to this extent: No action can any longer be brought against a bankrupt himself for breach of contract subsequent to the bankruptcy. But then we must see how the statute has dealt with such a case. The 23rd and 24th sections really deal only with the power given to the trustee to disclaim a contract, and with what is to be the effect if he elects to disclaim a contract. If the trustee elects to disclaim a contract, then the contract is to be deemed to have been determined from the date of the order of adjudication, and the person who had entered into the contract with the bankrupt is to have a right to prove against the estate upon the footing that the contract was put an end to at that time. He is entitled to prove for the amount of damages he has sustained by losing the contract as from that period. Neither the 23rd nor the 24th section, however, enacts anything as to what is to be the effect if the trustee does not disclaim. The 24th section, no doubt, says that if he does not disclaim within twenty-eight days after notice he cannot disclaim the contract at all, and if he cannot disclaim it the contract has not become rescinded as from the date of the order of adjudication. But then, what takes place if the trustee goes on with the contract for a time and then abandons it? What is to be the result of that? Really, the only words on which the Appellants can rely are those in the 2nd sub-section of the 25th section, that "subject to the provisions of this Act the trustee shall have power to carry on the business of the bankrupt

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as far as may be necessary for the beneficial winding-up of the same." Are those words sufficient to make the trustee personally liable for any damages the other party to the contract may have sustained by reason of the trustee throwing up a contract of the bankrupt after he had carried it on for a time, and after he had neglected to disclaim it, or are they sufficient to make the trustee liable to pay out of the estate the full amount of the damages occasioned by the breach? In my opinion those words are wholly insufficient for that purpose. They merely say that the trustee "may" carry on the business as far as is necessary for the purpose of a beneficial winding-up, and they do not, in my opinion, give the trustee any greater power than assignees in bankruptcy had previously to the passing of this Act. The words do not give the trustee power to enter into any new business, but only power to carry on the existing business so far as may be necessary for the beneficial winding-up. If there is any beneficial contract existing he may carry it out, but, in my opinion, that is not sufficient so to change the law as to make the trustee liable, either personally or out of the assets, to pay damages if the contract is subsequently broken. Then, if the statute had stopped there, the law would have remained just as it was. The bankrupt would have been liable to have an action brought against him on account of a breach of contract occasioned by the trustee having carried on a contract for a time and then having abandoned it. But the 31st section comes in and in express terms gives a right to prove for damages sustained by reason of a breach during the continuance of the bankruptcy of a contract made prior to the adjudication. That shews that there is a right to prove. At one period of the argument I thought the effect of the decision of the Court below was this, that it made no difference between a case where there was a disclaimer and a case where there was no disclaimer by the trustee. But upon consideration I think that there is a clear distinction. Where there is a disclaimer the contract is to be determined as from the date of the order of adjudication. Where there is no disclaimer the contract continues in force until it is broken. Indeed, properly speaking, it is never put an end to at all, but it is broken, and the question then arises, what are the damages occasioned by reason of its being broken at the time when it is broken? Those

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damages might under some circumstances be large, but they would be quite different from the damages which would be sustained by reason of the contract being rescinded at the date of the order of adjudication. I am of opinion, therefore, that the decision of the Chief Judge is quite right, there being no words in the Act which make the trustees, either personally or in their representative character, liable for the breach of contract. The only remedy of the Appellants is to prove under the 31st section for the damages which they have sustained.

Baggallay, J.A. BAGGALLAY, J.A.:—

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I am of the same opinion. I was for some time much impressed by Mr. *Benjamin's* argument, and was disposed to think that, as the trustees did not when called upon disclaim the contracts, they ought to be treated as having adopted them on behalf of the estate. But, upon a more mature consideration of the provisions of the Act, I think that it has not altered, and was not intended to alter, the state of the law affecting a bankrupt's contract, unless the trustee has disclaimed. There is first a general power given to the trustee to disclaim contracts, but then there is a subsequent provision that that power shall not be exercised after the expiration of twenty-eight days from the time when the trustee has been called upon to decide whether he will disclaim or not. It has been argued that a power to adopt contracts is conferred on the trustee by sub-sect. 7 of the 83rd section of the Act, but I think that the contracts there referred to are contracts to be entered into after the commencement of the bankruptcy, and that it has no reference whatever to contracts existing at the date of the bankruptcy.

JAMES, L.J.:—

The appeal will be dismissed with costs.

Solicitors for Appellants: *Ingledew, Ince, & Greening*, agents for *Ingledew, Ince, & Vachell, Cardiff.*

Solicitors for Trustee: *Vizard, Crowder, & Co.*, agents for *Dallons, Spencer, & Corbett, Cardiff.*

In re ENTWISTLE. *Ex parte* ARBUTHNOT.

C. A. 1876 July 27.

Bills of Exchange drawn against Goods—Specific Appropriation of Proceeds of Sale—Vendor and Purchaser—Bankruptcy of Purchaser.

Bills of exchange were drawn by the vendor and shipper of goods upon the purchaser for the invoice prices of the goods, with a direction to place the same to account of the shipments. On the acceptance of the bills by the purchaser the bills of lading were handed over to him. The bills of exchange were dishonoured at maturity, and the purchaser became bankrupt:—

Held, that there was no specific appropriation of the proceeds of sale of the goods to meet the bills of exchange.

Frith v. *Forbes* (1) explained.

THIS was an appeal from a decision of Mr. Registrar *Brougham*, sitting as Chief Judge in Bankruptcy.

John Entwistle, a merchant in *London*, filed a liquidation petition on the 2nd of November, 1875, under which, on the 17th of November, *E. Waterhouse* was appointed trustee.

Statement

Messrs. *Arbuthnot, Ewart, & Co.* were merchants in *London*. They also carried on business in *Bombay* under the firm of *Ewart, Latham, & Co.* The same persons were partners in the *London* and the *Bombay* firms. In May and June, 1875, *Entwistle* had made several purchases of cotton of *Arbuthnot, Ewart, & Co.* The orders were given by him, in the first instance, to the *London* firm, and were by them transmitted to the *Bombay* firm. *Entwistle* also wrote to the *Bombay* firm confirming the orders, and letters and telegrams on the subject passed between him and both the firms. For the purpose of paying for the cotton, bills of exchange were drawn by the *Bombay* firm upon *Entwistle*, and were forwarded by them to the *London* firm, who presented the bills to him for his acceptance. The bills of lading were not attached to the bills of exchange, but were forwarded by the *Bombay* firm to the *London* firm, for them to hand over to *Entwistle* in exchange for his acceptance of the bills of exchange. In some cases the bills of lading were not sent to *England* by the same mail as the

(1) 4 D. F. & J. 409.

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bills of exchange, but by a later mail, but in all cases *Entwistle* accepted the bills of exchange when they were presented to him for the purpose, and the bills of lading were handed over to him when he had done so, or as soon after as they arrived in *London*.

One of the bills of exchange (the others were in a similar form) was as follows:—

"No. M. 273. £3000. *Bombay*, 1st June, 1875.

"Three months after sight pay this first of exchange (second and third of same tenor and date not paid) to the *Chartered Mercantile Bank of India, London, and China*, or order, the sum of three thousand pounds sterling for value received, and place the same to account cotton shipments as advised, with or without further advice.

"(Signed) *Ewart, Latham, & Co.*

"To *John Entwistle*, Esq., *London*.

"Payable in *London*."

On the 28th of June, 1875, *Arbuthnot, Ewart, & Co.* wrote a letter to *Entwistle*, in which they informed him of the drawing of the bill for £3000, and mentioned that the bill of lading of 400 bales of cotton, in respect of which it had been drawn, had not arrived, and added, "We shall feel greatly obliged, therefore, by your kindly accepting our firm's drafts for our account against our handing you the documents on receipt by the next mail, which we hereby agree to do."

In a letter dated the 11th of June, 1875, written by the *Bombay* firm to *Entwistle*, after stating that they had not been able to send the bill of lading of the 400 bales of cotton by that mail, they added, "We trust the draft against the shipment met due honour notwithstanding"

On the 2nd of July *Entwistle* wrote a letter to the *Bombay* firm, in which he said, "I have accordingly accepted your draft for £3000 on account of the shipment, as advised."

When *Entwistle* received the bills of lading of the various shipments of cotton he indorsed them to *Chambers, Holden, & Co.*, brokers at *Liverpool*, who made him advances of money upon the

security of the cotton, of which, when it arrived at *Liverpool*, they obtained possession, and afterwards sold it, accounting for the proceeds.

Statement.

Entwistle stopped payment on the 15th of September, 1875. The bills which he had accepted for the cotton were then about to become due, and they were taken up on the 18th and 20th of September by *Arbuthnot, Ewart, & Co.*, for the honour of their *Bombay* firm. The total amount of the bills was equal to the total amount of the invoice prices of the shipments of cotton.

Arbuthnot, Ewart, & Co. were in no way privy to the course of dealing between *Entwistle* and *Chambers, Holden, & Co.* When *Entwistle* stopped payment, *Chambers, Holden, & Co.* were creditors of his to a large amount, and they held all the cotton which had been purchased by him from *Arbuthnot, Ewart, & Co.* On the 27th of September, before *Chambers, Holden, & Co.* had sold any part of it, *Arbuthnot, Ewart, & Co.* gave them notice that they claimed the proceeds of the cotton, as having been specifically appropriated to the payment of the bills of exchange, and required them not to part with the proceeds. They gave a similar notice to *Entwistle.* After this *Chambers, Holden, & Co.* sold the cotton and received the proceeds of sale, and on a settlement of their account with *Entwistle* there was a balance of £1595 due from them to him. It was arranged that this sum should be paid to *Entwistle's* trustee without prejudice to the claim of *Arbuthnot, Ewart, & Co.*, and application was made to the Court to determine the rights of the parties. The Registrar decided that there had been no specific appropriation, and that the trustee was entitled to the money. *Arbuthnot, Ewart, & Co.* appealed.

Argument.

W. Latham, for the Appellants, relied upon *Frith* v. *Forbes* (1) as shewing that there had been a specific appropriation of the cotton to meet the bills of exchange.

Horton Smith, for the trustee, was not called upon.

(1) 4 D. F. & J. 409.

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Judgment, James, L.J.

JAMES, L.J. :—

The case of *Frith* v. *Forbes* (1) must not be misunderstood. The Court there held, that in a transaction between principal and agent a direction given by the principal to the agent as to the application of the proceeds of the sale of particular goods was binding on the agent, and that he could not set up against it his own general lien. But that decision has nothing whatever to do with a transaction between vendor and purchaser. In the present case the goods became the absolute property of the purchaser. As soon as he received the bills of lading he had a right to do anything he pleased with them. There is no ground whatever for the appeal, and it must be dismissed with costs.

Mellish, L.J.

MELLISH, L.J. :—

I am of the same opinion.

Baggallay, J.A.

BAGGALLAY, J.A. :—

In *Robey & Co.'s Perseverance Ironworks* v. *Ollier* (2) *Frith* v. *Forbes* was commented upon, and the Lord Justice *James* then said that the decision in that case depended upon special circumstances, and could not be treated as governing any other case.

Solicitors for Appellants: *Freshfields & Williams.*
Solicitors for Trustee: *Johnson, Uptons, & Budd.*

(1) 4 D. F. & J. 409. (2) Law Rep. 7 Ch. 695.

In re COLLIE.

Ex parte MANCHESTER AND COUNTY BANK.

C. A.
1876
July 6;
Aug. 3.

Proof—Secured Creditor—Joint and Separate Estate—Shares in a Bank belonging to Partners, but standing in the Name of one Partner alone—Lien of Bank on the Shares—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 16 (*sub-s.* 5), 40—*Bankruptcy Rules*, 1870, *rr.* 99, 100.

By the articles of association of a joint-stock bank it was provided that the shares of every shareholder should be always subject to a lien thereon in favour of the bank for all moneys from time to time due from him to the bank in respect of any call, or as a debt or liability to the bank from him alone, or jointly with any other person.

At the commencement of the bankruptcy of two partners some shares in the bank stood in the name of *A.*, one of the two. The shares were in fact partnership property, though the bank did not know that any one but *A.* was interested in them. The partners owed the bank a large debt for moneys advanced to them. The whole of this debt had been contracted since the shares (which were originally the property of *A.* alone) had become partnership property:—

Held (*dubitante James*, L.J.), that the bank's security was on the joint estate, and that they could only prove against that estate for the balance of their debt after deducting the value of the shares.

Ex parte Connell (1) followed.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Murray*, sitting as Chief Judge, whereby he confirmed the rejection, in part, by the trustee under the bankruptcy of *Alexander* and *William Collie* (who were partners in trade under the firm of *Alexander Collie & Co.*), of a proof tendered against their estate on behalf of the *Manchester and County Bank, Limited.*

The affidavit of proof was made by the manager of the bank, and it stated that the bankrupts were indebted to the bank in the sum of £85,824 2*s.* 9*d.* for moneys advanced to them, and that the bank held no security for the debt, except certain bills of exchange mentioned in the schedule (which were bills drawn by the bankrupts upon and accepted by other firms and discounted by the bank), and except a lien, to which the bank were entitled under the provisions of their articles of association, upon 133

(1) 3 Dea. 201; 3 Mont. & A. 581.

C. A. 1876 *In re* COLLIE. *Ex parte* MANCHESTER AND COUNTY BANK. Statement.

shares in the bank of which *Alexander Collie* was the registered owner, and which lien the bank claimed to hold as a collateral security for the debt.

The trustee gave the bank notice that he rejected their claim to the extent of £5320, the value of the 133 shares in question, on the ground that the shares were part of the partnership estate, and that the bank were therefore not entitled to rank for dividend against that estate without first deducting the value of the shares from the amount otherwise due to them.

The bank were a company incorporated under the *Companies Acts*, 1862 and 1867. The articles of association contained the following clauses (*inter alia*) :—

"26. All the shares of every shareholder, and all dividends and profits from time to time payable to him out of the funds of the bank, shall be always subject to a lien thereon in favour of the bank for all moneys from time to time due from him to the bank in respect of any call, or as a debt or liability to the bank from him alone or jointly with any other person."

"27. The bank shall be entitled to have the lien made available by sale of the shares, and to retain and apply the moneys arising by the sale, and any such dividends or profits, in or towards repayment of the moneys so due to the bank, and in case of any action or suit being brought by the shareholder or his representative against the bank for the recovery of any such dividends or profits, the bank may plead this regulation in justification of the retention thereof."

"70. Every person from time to time entered in the register of shareholders as the holder of any share shall, unless and until his share be, by operation of law or otherwise, vested in some other person, be recognised and treated by the bank as the sole lawful and rightful holder and owner of the share, and any other person entitled, or claiming, to be the owner or holder of the share, or to be entitled as the holder thereof, shall not have any claim against the bank in respect thereof, but shall claim only against the person so entered and his representatives."

"71. No person, however claiming to be the owner or holder of any share, shall, as between himself and the bank, be entitled to be treated or recognised as the owner or the holder thereof, unless

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and until he is in accordance with the statutes entitled to be recognised by the bank as a shareholder in respect of the share, but this regulation shall not relieve any person from any engagement on his part to become the holder of any share, or from any liability in respect of any such engagement."

Statement.

The 133 shares in question were originally allotted to *Alexander Collie* in the year 1862, and they were paid for by him out of his own moneys. They continued to stand in the company's register in his name alone down to the commencement of the bankruptcy proceedings, and the dividends were always paid by the bank to him alone. The bank never had any knowledge, until after the commencement of the bankruptcy, that the firm of *Alexander Collie & Co.* had or claimed to have any interest in the shares. It appeared, however, by the books of the firm, that the 133 shares became in fact partnership property in 1864, and were thenceforth treated, as between *Alexander Collie* and his successive partners, as the property of the firm.

The firm opened an account with the bank in August, 1862. At that time it consisted of *Alexander Collie* and *George Collie.* In August, 1864, *George Yule* was admitted a partner. In November, 1869, *William Collie* was admitted a partner. *Yule* and *George Collie* both afterwards retired. The whole of the debt to the bank had been contracted after the shares had become partnership property. The Registrar, on the authority of *Ex parte Connell* (1), held that the bank were creditors holding security upon the joint property of the bankrupts, and that they could only prove for the balance of their debt after giving credit for the value of the shares.

The bank appealed.

Argument.

Finlay Knight (*Little*, Q.C., with him), for the Appellants:—

I contend that the bank are entitled to treat the shares as the separate property of *Alexander Collie.* He and his partners have always in effect represented to the bank that they were separate property.

[MELLISH, L.J.:—Does the rule of administration in bankruptcy

(1) 3 Dea. 201; 3 Mont. & A. 581.

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Argument.

depend upon what is held out by the debtor to the creditor, or upon what is the fact, whether the creditor knows it or not?]

I contend that it depends upon what is held out to the creditor.

[JAMES, L.J.:—Suppose money was advanced to *A.*, and a security was given for it professedly on the estate of *C.* If *A.* became bankrupt, could *C.* be then allowed to say that the estate belonged in fact to the bankrupt, and thus deprive the lender of his security?]

If this can be done we might be deprived of our lien in every case without our knowledge. *Ex parte Connell* (1), which is an authority, and the only authority, for the Registrar's decision, was a decision of the Court of Review, and it is not binding on this Court.

He referred also to *Lindley* on Partnership (2).

Roxburgh, Q.C., and *J. Linklater*, for the trustee:—

The question is simply this, are the shares part of the joint estate of the bankrupts?

[JAMES, L.J.:—As between them and the bank.]

No, in fact. The provisions of the *Bankruptcy Act* are clear that a creditor who has a security on part of the bankrupt's estate cannot prove his debt without first deducting the value of his security: *Bankruptcy Act*, 1869, ss. 16 (sub-s. 5), 40. These shares are admittedly joint estate.

[JAMES, L.J.:—Are they not only joint estate subject to the prior lien of the bank?]

The bank cannot by any arbitrary rule of their own alter the law of bankruptcy. *Ex parte Connell* was decided as long ago as 1838; it has never been questioned since. It was recognised as an authority in *In re Plummer* (3). *Ex parte Connell* settled this, that it is a question of fact whether the property is joint estate, it is immaterial what the creditor knew about it. If it is in fact joint estate, it must be administered according to the law of bankruptcy for the benefit of the joint creditors. If there was a lease

(1) 3 Dea. 201; 3 Mont. & A. 581. (2) Page 1220.
(3) 1 Ph. 56.

of property to one partner, and by the partnership articles the lease was made the property of the firm, a mortgagee of the lease must be treated as holding security on the partnership estate whether he knew it was partnership estate or not.

[MELLISH, L.J.:—I think the Act means the property of the bankrupt at the time the security is given.]

Here the evidence shews that the debt to the bank was contracted after the shares had become partnership property. The principle of the decision in *Ex parte Connell* (1) is this, that the property must be administered in the same way as the assignee in bankruptcy would have had to administer it if it had been in his possession.

Argument.

Finlay Knight, in reply.

Aug. 3. JAMES, L.J.:—

Judgment, [James, L.J.]

The question in this case is whether the bank's security is on the property of *Alexander Collie,* or on that of his firm, that property being shares in the bank standing in his name, but being, unknown to the bank, the property of the firm. If I were quite free to act on my own opinion I should give my voice in favour of the Appellants, on this broad general ground, that that which has been represented to a man and *bonâ fide* acted on by him as true ought, as between him and the persons making, or privy to, the representation, to be deemed to be true. In this case the bank acted on the belief, induced by that which was, I think, in effect equivalent to a representation by *Alexander Collie* and the successive firms of which he was a member, that the shares were his, and that they, therefore, had a security on shares which were the separate property of *Alexander Collie.* This representation, as I deem it to be, was not made or acted on with any view to evade any rule of the bankrupt law, or with any view to bankruptcy, and I should have thought that the bank were entitled to the full benefit of that representation as being the real truth, whatever the legal consequences. But, even if my colleagues agreed with

(1) 3 Dea. 201; 3 Mont. & A. 581.

C. A. 1876 *In re* COLLIE. *Ex parte* MANCHESTER AND COUNTY BANK. Judgment, Mellish, L.J.

me, it would not, perhaps, be proper to overrule a decision pronounced by a majority of the Judges in the year 1838, not since brought into question, and which was necessarily followed by the Registrar from whom the appeal is brought.

MELLISH, L.J.:—

The question to be determined in this case was whether Mr. Registrar *Murray* was right in holding that the proof of the *Manchester and County Bank* against the joint estate of Messrs. *Collie* ought to be reduced by the sum of £5320, being the value of certain shares in the bank, registered in the name of *Alexander Collie* alone. [His Lordship read clauses 26 and 27 of the articles of association, and continued:—]

The shares were originally the private property of *Alexander Collie*, but, in 1864, before any part of the debt sought to be proved was contracted, the shares became partnership assets, and continued to be partnership assets, subject to the charge upon them in favour of the bank, up to the time of the bankruptcy. There is, however, no evidence that the bank had any notice that any one but *Alexander Collie* had any interest in the shares. Under these circumstances it was held by the Registrar, upon the authority of *Ex parte Connell* (1), that the £5320 ought to be deducted from the proof, and I am of opinion that his decision ought to be affirmed. The case of *Ex parte Connell* is directly in point, and I am not aware that it has ever been overruled, or even disapproved of. The bank seeks to prove against the joint estate of Messrs. *Collie*. They are, as it appears to me, secured creditors within the 5th sub-section of the 16th section of the Act of 1869, and the 40th section. They hold a charge on a part of the joint estate as a security for the debt due to them, because it is a security over property which, if the security had not been given, would have been part of the joint estate, and which is now part of the joint estate subject to the security. It was contended on the part of the bank, that the effect of the articles of association is that, as between them and the *Collies*, the shares are to be treated as the sole property of *Alexander Collie*. The question, however, seems to me to be, not what was the contract between

(1) 3 Dea. 201; 3 Mont. & A. 581.

the bank and the *Collies*, but what are the respective rights of the bank and the other joint creditors, and I think the other joint creditors are entitled to say, It is nothing to us what the bankrupts may have represented, or what contracts they may have entered into. They cannot, by anything they may have said or done, prevent their estate being distributed according to the law of bankruptcy. If the security they, or either of them, gave was really a security on the joint estate, it follows that the creditors cannot realize that security, and also prove against the joint estate, without deducting its value. The question does not affect the validity of the security given by the articles of association. The security of the bank upon the shares for the joint debt remains the same according to either view. The question relates exclusively to the right of proof in respect of that part of the debt which is uncovered by the security, and it seems to me that must depend upon the right of proof which the law gives in the actual circumstances, and cannot depend on the representations or contract of the bankrupts. If the real debt due by a bankrupt is £100, he cannot, by any contract or representation he may have made, give a particular creditor a right to prove and receive dividends for £200 as a security for the payment of £100. Nor can he, in my opinion, by calling what is really joint estate separate estate, give a security upon the joint estate, and at the same time a right of proof without deducting the security on the joint estate.

Judgment, Mellish, L.J.

BAGGALLAY, J.A.:—

Baggallay, J.A.

I concur in the opinion that the decision of the Registrar in this case ought to be affirmed.

Apart from the provisions of the partnership articles, and under the articles of association of the bank, the bank had a lien upon the shares for the amount of the overdrawn joint account of the partners. If the matter had rested here, the shares in the hands of the bankers would, in my opinion, have been a separate security for the joint debt. But it appears that under the articles of partnership these shares became upon its formation partnership property, and this was before any portion of the joint debt was incurred. Consequently, at the date of the adjudication the

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bank were, in my opinion, secured creditors of *Alexander Collie & Co.* within the meaning of the 5th sub-section of sect. 16 of the Act, and as such must, under the 40th section, give credit for the value of the shares before their proof can be allowed.

I prefer to rest my decision upon the provisions of the *Bankruptcy Act* rather than upon the decision in *Ex parte Connell* (1), as to which I feel bound to say that my own views are more in accordance with those expressed by Sir *John Cross* than with those which influenced the decision of the majority of the Court, though, after the lapse of time since that case was decided, and having regard to the absence of any subsequent decision impugning it, I should not have felt myself justified in dissenting from it.

Solicitors for Bankrupt: *Phelps & Sidgwick*, agents for *Sale, Seddon, & Hilton, Manchester.*

Solicitors for Trustee: *Travers Smith & Co.*

C. A. 1876 C. J. B. *July* 3. C. A. *Aug.* 3.

In re BALBIRNIE. *Ex parte* JAMESON.

Composition—Secured Creditor—Execution—Writ delivered to Sheriff before filing of Petition—Seizure after Registration of Resolutions—Creditor voting for Composition without deducting Value of Security—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71) *ss.* 12, 16, 40, 126.

A judgment creditor delivered a writ of *fi. fa.* to the sheriff before the debtor filed a liquidation petition, but no seizure was made until after the creditors had resolved to accept a composition, the resolutions had been registered, and the debtor had paid the amount of the composition to a trustee appointed by the creditors:—

Held, that the execution creditor was not a creditor holding a security at the time when the composition became binding, and that he could not enforce his writ against the debtor's goods afterwards.

Ex parte Jones (2) explained.

A secured creditor who proves his debt under a liquidation petition, without deducting the value of his security, cannot, after a composition has been accepted, be allowed to set up his security.

10 Ch D. 685. 16 Ch D. 536-8 19 Ch D. 399.

Statement.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

Richard Jameson, in September, 1875, recovered judgment in

(1) 3 Dea. 201; 3 Mont. & A. 581. (2) Law Rep. 10 Ch. 663.

an action in the Court of Exchequer against *Alexander Balbirnie* (who was a wine merchant at *Liverpool*, and resided at *Rock Ferry, Cheshire*) for £256 8*s.* 4*d.*; and on the 1st of October, 1875, a writ of *fi. fa.* was lodged with the sheriff of *Cheshire*, but no attempt to levy was made then.

On the 20th of November, 1875, *Balbirnie* filed a liquidation petition in the *Birkenhead* County Court. The first meeting of the creditors was held on the 9th of December, when it was resolved to accept a composition of 2*s.* 6*d.* in the pound, payable in one month from the registration of the resolutions; and that *T. H. Sheen* should be appointed trustee in the matter. The name of *Jameson* and the amount of his debt had been inserted in the debtor's statement, and notice of the meeting had been sent to him, but he did not prove his debt or take any part in the proceedings at the first meeting.

The second meeting of the creditors was held on the 20th of December, when the resolutions were confirmed. *Jameson* proved the full amount of his debt at this meeting, and voted in favour of the resolutions, which were registered on the 22nd of December.

On the 17th of January, 1876, the debtor placed in the hands of the trustee a sum sufficient to pay the composition to all the creditors. Notice of this was sent to *Jameson*, but he did not apply for his composition, and it was not paid to him. On the 22nd of February the sheriff levied execution under the *fi. fa.* on the furniture in *Balbirnie's* house. The furniture seized was claimed by *Robert Mitchell*, the debtor's father-in-law, who had provided the money to pay the composition, the debtor having given him as security a bill of sale of the furniture. Notice of *Mitchell's* claim was given to the sheriff, who took out an interpleader summons; and, on the 29th of February, Mr. Justice *Archibald* directed an issue to be tried to determine the rights of the parties. On the 17th of March, 1876, on the application of *Balbirnie*, the Judge made an order perpetually restraining *Jameson* from taking any further proceedings upon his judgment, and ordering the sheriff to withdraw from possession. On the 23rd of May, upon the application of *Jameson*, this injunction was dissolved. From this order *Balbirnie* appealed to the Chief Judge. The appeal was heard on the 3rd of July, 1876.

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Argument.

There was evidence on the part of *Jameson* that he proved his debt and voted upon an express understanding with the debtor that his doing so should not affect his right to enforce his *fi. fa.* This, however, was denied by the debtor.

R. Vaughan Williams, for the Appellant:—

The County Court Judge based his decision on *Ex parte Jones* (1). But that case does not apply, for there the sheriff had seized under the *fi. fa.* before the first meeting of the creditors. The execution creditor had therefore become a secured creditor before the composition was agreed to: *Slater* v. *Pinder* (2); and his security could not be defeated by composition resolutions, which have no relation back, but only operate from the time of their being passed. The delivery of the writ to the sheriff does not give the execution creditor a security; he does not acquire a security until seizure: *Ex parte Williams* (3). The meaning of the decision in *Ex parte Jones* is made clear by an observation of *James*, L.J., in *Ex parte Lennard* (4). At any rate, by proving his debt in full, the execution creditor has forfeited his security, if he ever had one.

F. O. Crump, for the execution creditor:—

As against the debtor, the goods were bound from the time of the delivery of the writ to the sheriff: *Ex parte Williams;* and on the passing of the composition resolutions the property in the goods revested in the debtor. The real ground of the decision in *Ex parte Jones* was that the writ had been delivered to the sheriff, and a security acquired as against the debtor, before the composition was agreed to, and that was done in the present case. The fact that the execution creditor proved his debt makes no difference; his doing so might have been a ground of objection to the registration of the resolutions if the vote had affected the statutory majority; but the objection was not taken then, and it is too late to take it now. Besides, a creditor is equally bound by the resolution whether he votes or not. Moreover, the evidence shews that the creditor was induced to vote for the composition by the debtor

(1) Law Rep. 10 Ch. 663.
(2) Law Rep. 6 Ex. 228; Ibid. 7 Ex. 95.
(3) Law Rep. 7 Ch. 314.
(4) 1 Ch. D. 177, 180.

telling him that his security would not be prejudiced. Under such circumstances, this Court would not restrain an action by the creditors: *Ex parte Halford* (1). The Court of Bankruptcy has no jurisdiction over the estate of a compounding debtor: *Ex parte Manchester and Liverpool District Banking Company* (2). At any rate, if the Appellant has a good defence, it is one which is available in the action: *Slater* v. *Jones* (3); and this Court will not interfere.

Channell, for the sheriff.

Williams, in reply:—

The secret agreement between the debtor and the execution creditor which is set up would be a fraud upon the other creditors, and the debtor could recover back any sum which he had paid under it: *Smith* v. *Cuff* (4).

BACON, C.J.:—

The principles relating to composition have been so long established that they are open to no kind of question. What is a composition? The debtor files his petition, and makes a statement of his debts and his means of satisfying them. A meeting of the creditors is summoned, and they may then vote in favour of either bankruptcy, liquidation by arrangement, or composition. In the present case the Appellant, without preferring any claim as a secured creditor, proved his debt, and voted in favour of the composition; and he thus entered into an agreement with all the other creditors to accept the composition in satisfaction of his debt, and, as a consequence of this, that the debtor should be left in full possession of all his estate. To what end is this done? That the debtor may be able to satisfy the composition. How can a creditor, who holds out to all the other creditors that he is not a secured creditor, be allowed afterwards to set up that he holds a security on the debtor's property? It would be contrary to every principle of justice if he could do this. But that is not all. In

(1) Law Rep. 19 Eq. 436.
(2) Ibid. 18 Eq. 249.
(3) Law Rep. 8 Ex. 186.
(4) 6 M. & S. 160.

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Ex parte Jones (1), before any agreement for a composition had been made, the execution creditor had, by means of seizure, become a secured creditor, and plainly a composition cannot affect any securities which the creditors hold. There was in that case no acquiescence, no voting by the creditor in favour of the composition. It has no application to the present case, unless it can be held, as it cannot after the decision in *Ex parte Williams* (2), that the mere lodging of the writ of *fi. fa.* with the sheriff constitutes the execution creditor a secured creditor. Here the second meeting of the creditors took place long before the sheriff seized. *Ex parte Manchester and Liverpool District Banking Company* (3) and *Ex parte Halford* (4) have nothing to do with the present case, which is an extremely simple one. The creditor voted in favour of a resolution which provided that his debt should be for ever satisfied if he received the composition agreed upon, and this resolution became binding on all the creditors long before the sheriff seized, and, until that seizure had taken place, it could not be said that he held any security for his debt upon the debtor's property. In my opinion the creditor was properly restrained from proceeding with his execution, the object of composition resolutions being that the debtor shall remain in possession of his estate for the purpose of satisfying the composition. The appeal must be allowed, but no action must be brought against the sheriff.

C. A. From this decision the execution creditor appealed. The appeal was heard on the 3rd of August, 1876.

Argument. *F. O. Crump*, for the Appellant:—

This case is governed by the decision in *Ex parte Jones*. As against the debtor the goods are bound from the time of the delivery of the writ to the sheriff.

[MELLISH, L.J.:—Are you a secured creditor merely because the goods are bound as against the debtor? If you are not a secured creditor, you are bound by the composition. The fact that no attempt was made to levy for so long is strong evidence that

(1) Law Rep. 10 Ch. 663.
(2) Ibid. 7 Ch. 314.
(3) Law Rep. 18 Eq. 249.
(4) Ibid. 19 Eq. 436.

the writ was not delivered to the sheriff for the purpose of execution.]

It was held over at the debtor's request.

[MELLISH, L.J.:—The creditor's proving his debt and voting at the meeting is in effect the same thing as if he had executed a composition deed. Is not the whole transaction a fraud on the other creditors? They might have got a larger composition from the debtor.]

Argument.

The other creditors might have objected to the registration of the resolutions, but they did not.

[JAMES, L.J.:—The execution was concealed from the other creditors.]

The question in dispute might have been decided in the interpleader isssue. The debtor could have pleaded his discharge.

MELLISH, L.J.:—Your levy was really not on the debtor's goods, but on the goods of *Mitchell*, who was a purchaser from him. The *Mercantile Law Amendment Act* requires that there shall be a levy under the writ in order to bind a third party. And even before that Act, a third party would not have been bound if the writ had not been delivered for the purpose of being executed.

JAMES, L.J.:—It is clear that in this case the writ was not delivered for that purpose.

R. Vaughan Williams, for the debtor, was not heard.

JAMES, L.J.:— Judgment.

The appeal must be dismissed with costs.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors for Debtor: *Ashurst, Morris, & Co.*

Solicitor for Execution Creditor: *G. B. Wheeler*, agent for *R. Jameson, Liverpool.*

Solicitors for Sheriff: *Milne, Riddle, & Mellor*, agents for *J. Tatlock, Chester.*

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In re NEWMAN. *Ex parte* BROOKE.

Provable Debt—Damages in Action of Tort—Verdict before, but Judgment not signed till after, Adjudication—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 31.

17 Ch D. 124
10 Ch D 764
11 Ch D 523.

Damages recovered in an action of tort are not, under sect. 31 of the *Bankruptcy Act*, 1869, provable in the bankruptcy of the Defendant, unless judgment is signed before the adjudication.

If judgment is not signed till after the adjudication, even though the verdict was obtained before, the bankrupt is not discharged from the liability.

Ex parte Peacock (1) distinguished.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, sitting as Chief Judge in Bankruptcy.

William Newman was an omnibus proprietor. On the 22nd of July, 1875, *Charlotte Brooke* commenced an action against him in the Court of Queen's Bench, to recover damages for injuries alleged to have been sustained by her at the hands of one of his servants. The action was tried on the 14th of January, 1876, when a verdict of £50 was found for the Plaintiff, leave being given to the Defendant to move to have the verdict entered for him. This motion was made on the 26th of April, when it was refused, and the Court ordered judgment to be entered for the Plaintiff for £50 and costs. On the 6th of May *Newman* filed a liquidation petition, and the same day a receiver was appointed, and an interim injunction was obtained restraining any further proceedings by Miss *Brooke* in the action until after the 13th of May. On that day an order was made continuing the injunction until the 9th of June, the first meeting of the creditors under the petition having been fixed for the 3rd of June. On the 3rd of June the creditors resolved to accept a composition of 2*s.* in the pound. On the 9th of June an order was made continuing the injunction till after the 17th of June, with the exception that Miss *Brooke* was to be allowed to sign judgment in the action. On the 13th of June the second meeting of the creditors was held,

(1) Law Rep. 8 Ch. 682.

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and the resolution for a composition was confirmed. On the 17th of June Miss *Brooke* signed judgment for the £50, and £83 10*s.* 4*d.*, the taxed costs of the action, and on the same day the injunction was again continued till the 3rd of July. On the 29th of June the resolutions were registered, and on the 3rd of July the Registrar made an order perpetually restraining Miss *Brooke* from further proceeding upon her judgment.

Miss *Brooke* appealed.

Argument.

De Gex, Q.C., and *Robertson Griffiths*, for the Appellant:—

These damages do not constitute a debt or liability provable in the composition, for judgment was not signed until after the passing of the resolutions: *Bankruptcy Act*, 1869, s. 31 (1). Therefore the debtor is not discharged, and the injunction ought not to have been granted: *Ex parte Baum* (2).

Bagley, and *Robson*, for the debtor:—

This is a liability provable in the composition. It is a liability

(1) Sect. 31 provides: "Demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise shall not be provable in bankruptcy, and no person having notice of any act of bankruptcy available for adjudication against the bankrupt shall prove for any debt or liability contracted by the bankrupt subsequently to the date of his so having notice.

"Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the bankrupt is subject at the date of the order of adjudication, or to which he may become subject during the continuance of the bankruptcy by reason of any obligation incurred previously to the date of the order of adjudication, shall be deemed to be debts provable in bankruptcy, and may be proved in the prescribed manner before the trustee in the bankruptcy.

"'Liability' shall, for the purposes of this Act, include any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether such breach does or does not occur, or is or is not likely to occur or capable of occurring before the close of the bankruptcy, and generally it shall include any express or implied engagement, agreement, or undertaking to pay, or capable of resulting in the payment of, money or money's worth, whether such payment be, as respects amount, fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency or on two or more contingencies; as to mode of valuation capable of being ascertained by fixed rules, or assessable only by a jury, or as matter of opinion."

(2) Law Rep. 9 Ch. 673.

C. A. 1876 — *In re* NEWMAN. *Ex parte* BROOKE. — Argument.

arising by reason of an obligation incurred by the debtor previously to the passing of the resolution. In *Ex parte Peacock* (1) it was held that where in an action for breach of contract a verdict had been found for the Defendant, his costs were provable under the Plaintiff's composition, though they were not taxed until after the passing of the resolutions. Under the old law the Defendant's costs of an unsuccessful action on a contract stood in precisely the same position as damages recovered by the Plaintiff in an action of tort. In neither case could there be a proof in bankruptcy unless judgment had been signed before the adjudication: *Ex parte Goodier* (2).

[MELLISH, L.J.:—Sect. 31 does not apply to actions in tort, damages in such an action fall within the introductory words of the section. A mere claim for costs does not.]

We contend that after verdict, whatever the nature of the action, there is a liability or obligation on the part of the debtor; nothing then remains to be done but the mechanical act of signing judgment. The damages are liquidated by the verdict.

[JAMES, L.J.:—The verdict might be set aside or the amount of the damages reduced.

MELLISH, L.J.:—Under the old law it is clear that there was no right to prove in such a case unless judgment had been signed before the adjudication. The question is whether sect. 31 has altered the law.]

The word "liability" did not occur in the former Bankruptcy Acts. In *Ex parte Baum* (3) the action had not been tried.

Judgment, James, L.J. —

JAMES, L.J.:—

I am of opinion that the Registrar's order was wrong. The first clause of sect. 31 contains clear negative words, and was, I think, meant to preserve the old law with regard to the proof in bankruptcy of damages for a tort. Certainly, under the old law damages in an action of tort were not a provable debt in bankruptcy until judgment had been signed. The old law as to that

(1) Law Rep. 8 Ch. 682. (2) 22 L. T. (N.S.) 426.
(3) Law Rep. 9 Ch. 673.

remains, in my opinion, now exactly as it was. Unless judgment has been signed damages for a tort are not included in the second clause of the section commencing with the words "save as aforesaid;" and when judgment for such damages is signed after the adjudication the amount of the judgment is not a debt or liability to which the bankrupt is subject at the date of the adjudication, or to which he has become subject afterwards by reason of any obligation incurred previously to the adjudication. The *ratio decidendi* of *Ex parte Peacock* (1) was that the successful Defendant's costs of an action founded on contract, though not taxed till after adjudication, were within the second clause of sect. 31, and that case is no authority for the present, to which the first clause of the section clearly applies.

Judgment, James, L.J.

MELLISH, L.J.:—

Mellish, L.J.

I am of the same opinion. It was clear law before the present Bankruptcy Act that there could be no proof for damages in an action of tort until judgment had been signed, and I am of opinion that the first clause of sect. 31 was intended to preserve the law in this respect as it was. And the costs, being a mere addition or appurtenance to the damages, must follow the same rule as that to which they are attached. In *Ex parte Peacock* the costs were those of a successful Defendant, and were not attached to anything else.

BAGGALLAY, J.A.:—

I entirely concur.

Solicitors for Appellant: *Webster & Graham.*
Solicitors for Debtor: *Evans & Eagles.*

(1) Law Rep. 8 Ch. 682.

C. A.
1876
C. J. B.
July 10.
C. A.
Aug. 3.

In re LANCASTER. *Ex parte* LANCASTER.

Debtor's Summons—Service—Solicitor—Country Agent—Clerk—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 6, 7, 8—*Bankruptcy Rules*, 1870, *rr.* 21, 61.

When a debtor's summons is served by the creditor's solicitor under rule 61 of the *Bankruptcy Rules*, 1870, the solicitor need not effect the service with his own hand. It may be effected by his clerk, or by the clerk of the country agent of a *London* solicitor.

Statement.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

A debtor's summons was issued out of the *Barnstaple* County Court on behalf of *Matthew Wildsmith*, a tradesman in *London*, against *W. M. Lancaster*, a non-trader, who resided near *Holsworthy*, in *Devonshire*. *Wildsmith's* solicitor was Mr. *William Foster*, who carried on business in *London*. The summons was applied for by Mr. *G. O. Peard*, a solicitor at *Bideford*, who was instructed by *Foster* to apply for it, and serve it upon *Lancaster*, and it was, on the 13th of March, 1876, served upon him personally by a clerk of *Peard*. The summons was indorsed with the name of *Foster*. The summons not having been complied with, a bankruptcy petition was, on the 7th of April, presented against *Lancaster*, the act of bankruptcy alleged being the non-compliance with the summons. When the petition came on to be heard, it was objected on behalf of *Lancaster* that no act of bankruptcy had been committed, because the summons had not been duly served in accordance with rule 61 (1). It was contended that the service by the clerk of the *London* solicitor's country agent was not a proper service, and that service ought to have been made by the *London* solicitor himself. The Judge adopted this view, and dismissed the petition. *Wildsmith* appealed to the Chief Judge.

The appeal was heard on the 10th of July, 1876.

Argument.

E. C. Willis, for the Appellant:—

It is not necessary that the solicitor should serve the summons

(1) Rule 61 provides: "A debtor's summons or a petition shall be served upon the debtor by an officer or a bailiff of the Court, or by the creditor or his attorney."

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with his own hand; he may serve it in the same way as he would serve a writ in an action.

[He referred to the *Bankruptcy Act*, 1869, ss. 6, 7, 8; Bankruptcy Rules, 1870, rr. 59, 61; *Ex parte Hunt* (1); *Ex parte Bolland* (2).]

Winslow, Q.C., and *Finlay Knight*, for the debtor:—

The service should be made by some one to whom the debtor can properly pay the debt. If it is served by the bailiff of the Court, then the money can be paid into Court. If the creditor's solicitor serves it, the payment can be made to him. But how can the debtor pay the money to somebody who says he is the clerk of the country agent of the solicitor, whose name appears on the summons? We should contend that even the solicitor's own clerk could not act for him. There can be no act of bankruptcy unless the Rules are followed with the utmost strictness: *Ex parte O'Loghlen* (3); *In re Hodges* (4). If the solicitor can delegate his power, so can the creditor himself. *Ex parte Hunt* does not apply. Rule 21 requires that a debtor's summons shall be indorsed with the name and place of business of the attorney actually suing it out.

Judgment, C. J. B.

BACON, C.J.:—

In my opinion the proceedings upon this debtor's summons have been perfectly regular. Rule 21 has been complied with; the summons is properly indorsed under rule 21. I find, too, that it clearly describes the nature of the debt, and gives the fullest notice to the alleged debtor of the consequences of his not obeying it. Rule 61 is relied upon, but what is the meaning of that rule? If there existed in the particular County Court an order, as was the case in *Ex parte Bolland*, that the service of any process must be effected by its own officer, that would be a different matter. But rule 61 provides that the summons may be served by the creditor himself, or by his attorney. Here the creditor employed an attorney. The argument on the part of the Respondent must go to this length, that if an attorney is employed to serve the summons, he must serve it with his own hand. That would be

(1) Law Rep. 8 Ch. 234.
(2) Ibid. 19 Eq. 131.
(3) Law Rep. 6 Ch. 406, 412.
(4) Ibid. 8 Ch. 204.

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In re LANCASTER. *Ex parte* LANCASTER.
Judgment, C. J. B.

absurd. The rule must mean that what is done by the attorney may be done by him in the same way as anything else which he does in the ordinary course of his business. It would be absurd to suppose it was intended that, if a tradesman in *London* employed his solicitor to issue and serve a summons on a debtor in the country, the solicitor must go himself, it may be hundreds of miles, into the country to effect the service. The reasonable construction is that the attorney is to perform this business in the same way that he performs any other business which is intrusted to him by a client. A *London* solicitor naturally employs a country solicitor as his agent to do business for him in the country, and the country solicitor employs a clerk to act for him. None of the cases which have been referred to are opposed to this construction. The observations of Lord Justice *Mellish* in *Ex parte O'Loghlen* (1), which have been read, are rather in favour of it; and in this 61st rule, just as in the rule in question in *Ex parte Hunt* (2), there are no negative words. All that is required to justify the making of an adjudication is that the Court should be satisfied that a debtor's summons in due form has come to the debtor's hands. The service is not to be made void merely because there has not been a strictly literal compliance with the words of the rule. In my opinion the service in this case was perfectly regular. The case must go back to the County Court to proceed with the petition. The costs of the appeal will be made costs of the petition.

C. A.

From this decision the debtor appealed, and the appeal was heard on the 3rd of August, 1876.

Argument.

Winslow, Q.C., and *Finlay Knight*, for the Appellant:—

According to sect. 6 of the Act there is no act of bankruptcy unless the summons is served in the prescribed manner. The rules must be strictly complied with. The object is that the debtor may know whom he is to pay. If the attorney can delegate his power, so can the other persons mentioned in sect. 61. The creditor might employ any one to effect the service.

[MELLISH, L.J.:—I think the object of the rule is to secure that

(1) Law Rep. 6 Ch. 406, 412. (2) Law Rep. 8 Ch. 234.

a responsible person shall effect the service and make the affidavit of service. Surely the high bailiff of a County Court never personally serves a debtor's summons.]

The high bailiff has power by statute to appoint sub-bailiffs. Here the service was effected by the clerk of some one whose name does not appear on the proceedings at all.

[JAMES, L.J. :—The relation of attorney and agent is one well known to the law. In an action service on the *London* agent of an attorney is service on the attorney.]

In that case the documents are indorsed with the agent's name; here there is a special provision that the summons is to be indorsed with the attorney's own name.

Argument.

E. C. Willis, for the creditor, was not called upon.

JAMES, L.J. :—

Judgment, C. A. James, L.J.

I am of opinion that the decision of the Chief Judge is quite right. We must put a reasonable interpretation upon this rule. Every one who is connected with bankruptcy proceedings, or indeed who has anything to do with the administration of the law of this country, knows that attorneys are not in the habit of personally serving any legal process, but that they employ their clerks to do it for them, or, if they reside at a distance from the place where the service is to be effected, they employ an agent on the spot. The appeal must be dismissed with costs.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors for Appellant: *Clarke, Woodcock, & Ryland.*
Solicitor for Respondent: *W. Foster.*

C. A.
1876
V.-C. B.
April 26.
C. A.
July 18.

BARING *v.* STANTON.

[1872 B. 149.]

Agent—Insurance—Commission—Discount.

A shipowner had for several years had an account with merchants who effected for him insurances on his ships. In their accounts they charged him with the full premiums, but they had been allowed by the underwriters, and retained out of the premiums 5 per cent. brokerage and a further 10 per cent. discount for ready money, as usual on insurances. On taking the accounts in a suit respecting a mortgage on some ships the shipowner objected to allow the merchants to retain the 10 per cent.:—

Held, that as these allowances were usual, and as the shipowner had never inquired on what terms the merchants effected the insurances, and appeared to have accepted their terms, he could not now raise the objection.

Order of *Bacon*, V.C., affirmed.

Statement.

THE Plaintiffs in this case were Messrs. *Baring Brothers & Co.*, merchants in *London*, and the Defendant, *George Stanton*, was an American shipowner who had for some years been in business in *London*. From 1861 to 1872 *Stanton* had had an account current with Messrs. *Baring*. He was in 1872 indebted to them in about £22,000, and the ships *Stockbridge*, *Hoogly*, *Trowbridge*, and *Kingsbridge* were mortgaged to them. An arrangement was, as they alleged, then made by which they became absolute owners of the *Trowbridge* and the *Kingsbridge*. In May, 1872, Messrs. *Baring* filed a bill against *Stanton* to have a fresh mortgage of the *Stockbridge* and the *Hoogly*, on the footing that the *Trowbridge* and the *Kingsbridge* belonged to them absolutely. *Stanton* filed a cross-bill against Messrs. *Baring* to have it declared that they were only mortgagees of the *Trowbridge* and the *Kingsbridge*. A decree was made in *Baring* v. *Stanton* for a mortgage as prayed by the bill, and accounts were directed. Messrs. *Baring* had insured ships for *Stanton*, and in their accounts they claimed as against him the full amount of premiums as paid by them, with interest thereon at 5 per cent., without deducting from the amount so charged, and in fact claiming to retain, 5 per cent. commission or brokerage allowed to them by the insurance offices on the premiums, and 10 per cent. discount for ready money also allowed by the insurance offices.

C. A. 1876 BARING v. STANTON. Statement.

Messrs. *Baring* made affidavits and produced other evidence that it was a matter of course to debit the customer, on the day on which the premium for insurance was fixed, with the full amount, and to retain the 5 per cent. brokerage and 10 per cent. discount which were always allowed by the insurance companies, and to charge the customers with 5 per cent. interest on the full amount of the premium.

Stanton deposed that for some years after he commenced business with Messrs. *Baring* he was resident in *America*, and was not aware that they were receiving these discounts and brokerage; that shortly before he filed his bill he became aware of this, and that if he had been previously aware of it he should have objected. He produced affidavits by merchants who had been in the habit of allowing to their customers these discounts and brokerage.

Stanton in Chambers submitted to allow the brokerage; but the question as to the allowance of discount was argued before the Vice-Chancellor *Bacon* on an adjourned summons on the 6th of April, 1876, when the same counsel appeared and the same arguments were used as before the Court of Appeal.

Judgment. V.-C. B.

BACON, V.C., said that he considered this case settled by the decision in *Great Western Insurance Company* v. *Cunliffe* (1). The view which His Lordship had taken of that case was not concurred in by the Lords Justices, and in delivering their judgments they had decided certain points in the most explicit manner, so that it would be impossible for His Lordship to adhere to his former opinion. Whether the money was actually paid made no difference whatever. If between the underwriter and the broker, the only persons concerned, credit was given and taken, that was equivalent to payment, and the matter could not be further inquired into. Though the evidence might not prove a general custom, there was clear evidence that Messrs. *Baring* had always carried on their business in that way. The custom was not unreasonable, and His Lordship was bound to treat this as a case decided by the Court of Appeal.

(1) Law Rep. 9 Ch. 525.

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The Defendant *Stanton* appealed, and the appeal came on for hearing on the 18th of July, 1876.

C. A. Argument.

Kay, Q.C., and *Caldecott*, for the Appellant:—

This is quite different from *Great Western Insurance Company* v. *Cunliffe* (1), as here the agents take 5 per cent. brokerage for their labour, and thus have been remunerated. As agents, their accounts ought to have shewn to their principal all allowances; but nothing of the kind appeared, and the Defendant says that he was not aware of it. An agent is bound to tell his principal everything, without any inquiry by the principal. The Plaintiffs have entirely failed in shewing a general custom of which every one, still less a stranger to this country, must be taken to be aware. *Turnbull* v. *Garden* (2) and *Queen of Spain* v. *Parr* (3) are decisive against these charges. There are two systems of allowance; in one system there is a current account between the broker and the underwriter, and if at the end of the year the underwriter has made a profit on all his dealings with the broker, he allows the broker 12 per cent. on that profit, which was the case in *Great Western Insurance Company* v. *Cunliffe*, and was a main ground for that decision. Here the other system was adopted. The premiums were paid in ready money, and a 10 per cent. discount was allowed on each transaction, and ought to have been allowed to the customer. The custom seems to have been recognised as long ago as in *Power* v. *Butcher* (4), but it is not universal, and the agent must shew either universal custom or a particular contract.

Cotton, Q.C., and *J. Kaye*, for the Plaintiffs, were not called upon.

Judgment, C. A. James, L.J.

JAMES, L.J.:—

I am of opinion that the order of the Vice-Chancellor in this case ought to be affirmed.

The question is whether this case is governed by the decisions

(1) Law Rep. 9 Ch. 525.
(2) 38 L. J. (Ch.) 331.
(3) 39 L. J. (Ch.) 73.
(4) 10 B. & C. 329.

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Judgment, C.A. James, L.J.

made by me, as Vice-Chancellor, in *Queen of Spain* v. *Parr* (1) and in *Turnbull* v. *Garden* (2), or by the case of *Great Western Insurance Company* v. *Cunliffe* (3). It appears to me that that last case really governs this. In that case the Lord Justice *Mellish* observed (4): "Then it is quite obvious that they must have known, and they do not deny that they did know, that Messrs. *Pickersgill* were to be remunerated by receiving a certain allowance or discount from the underwriters with whom they made the bargains. It was easy to ascertain by inquiry what was the usual and ordinary charge which agents who effect reinsurances are entitled to make. If a person employs another, who he knows carries on a large business, to do certain work for him as his agent with other persons, and does not choose to ask him what his charge will be, and in fact knows that he is to be remunerated not by him but by the other persons—which is very common in mercantile business—and does not choose to take the trouble of inquiring what the amount is, he must allow the ordinary amount which agents are in the habit of charging." That really seems to me to govern this case. It is quite clear that it was known to everybody connected with insurances that the insurance offices were in the habit of making allowances, by way of brokerage and otherwise, of 12 per cent. of the profits, or 10 per cent. discount, and also 5 per cent. brokerage; so much so, that some of the documents produced actually contain the thing printed as common form. It is quite obvious that this is a recognised practice of the offices. That being so, it is very difficult to believe that Mr. *Stanton* must not have known that Messrs. *Baring* were receiving from the offices such allowances as the offices were in the habit of making. Their dealings go on for years. Mr. *Stanton* never takes the trouble to make inquiries, but settles all the accounts, and deals with Messrs. *Baring* on that footing; and it is not unimportant in this case to observe that when he filed a bill—it is true for another object, to have a declaration that the conveyance of the ships was by way of mortgage only—and asked that upon the footing of that mortgage the accounts might be taken, he actually referred to the accounts which would have to be taken, and accepted the course of business between

(1) 39 L. J. (Ch.) 73.
(2) 38 Ibid. 331.
(3) Law Rep. 9 Ch. 525.
(4) Ibid. 539.

C. A. 1876 BARING v. STANTON. Judgment, C. A.

the two firms including the very thing which is now the subject of this discussion. [His Lordship then read some of the statements.] After that, as between himself and Messrs. *Baring*, it seems impossible to allow him to reopen an account which has gone on from the year 1861 to the year 1872. I am of opinion, therefore, that the order of the Vice-Chancellor ought to be affirmed, and this appeal dismissed with costs.

Mellish, L.J.

MELLISH, L.J.:—

I am of the same opinion. I think that this case cannot in principle be distinguished from the case of *Great Western Insurance Company* v. *Cunliffe* (1). It appears that there are two ordinary modes in which agents employ underwriters—the cash system and the credit system. According to the credit system the accounts are made out at the end of the year; all the premiums which the particular merchant or agent has brought to the underwriter are put on one side, and all the losses are put on the other side, and then, if there is a profit, the underwriter allows the merchant 12 per cent. on that profit. We held that the merchant who brought the business was entitled to keep that profit. The cash system adopted in this case is this: Some underwriters, particularly new insurance companies, object to a long credit system, and prefer a system by which they get their premiums paid at once. They are willing to make a sacrifice for the purpose of obtaining prompt payment, and on payment, instead of the 12 per cent. on the net profits, if the premium is paid within a fixed number of days after the insurance is effected, they make an allowance of 10 per cent., the customers being charged with the premiums just as before. If that is generally known and acquiesced in, I cannot conceive that it is a fraud upon anybody. It may be a misfortune to Mr. *Stanton*, that being an American, he really did not know the usage in *London*. But if a person comes and trades in *London*, he must make himself acquainted with the usages in *London*, and when he employs the Messrs. *Baring* he must expect the Messrs. *Baring* to treat him in the same way as they treat all their other customers, and he cannot be entitled because, after ten years' business transactions with them, he quarrels with them, to say that they should treat him in a different way from that in which they treat

(1) Law Rep. 9 Ch. 525.

anybody else. According to the evidence of Messrs. *Baring's* clerk, this is the invariable way in which they charge their customers, and if Mr. *Stanton* had inquired before he employed Messrs. *Baring* what their charges were, they would have told him that these were their charges. But he had confidence in them, and he thought that they would charge what was right whether he asked them or not, and cannot now be allowed to open the accounts. I think we do not at all overrule the case of *Turnbull* v. *Garden* (1), because, as I understand, in that case the party from whom the discount was taken was not in the position of Messrs. *Baring*, but was an agent for somebody else. The real brokers were willing to allow a discount, and then the question was whether the next agent could keep it in his own pocket, or was bound to give it to the principal, which was an entirely different question.

Judgment, C.A. Mellish, L.J.

I am of opinion, therefore, that the judgment of the Vice-Chancellor in this case ought to be affirmed.

BAGGALLAY, J.A.:—

Baggallay, J.A.

I am of opinion that this case is entirely governed by the decision in *Great Western Insurance Company* v. *Cunliffe* (2), and that there is nothing whatever in that case which was antagonistic to the principle established in the cases of *Turnbull* v. *Garden* and *Queen of Spain* v. *Parr* (3). It appears to me that, exactly as in *Great Western Insurance Company* v. *Cunliffe* Messrs. *Pickersgill* were employed, in this case Messrs. *Baring* were employed, to do a particular business, namely, that of insuring, and they were making certain profits, incidental to the carrying on of that business. That certainly appears to have been the view of the case which was taken by Mr. *Stanton* when he filed his bill against Messrs. *Baring*, the statements in which bill he verifies by affidavit, in a form which implies that that was the ordinary and usual course of business, and that he had been aware of it throughout.

Solicitors for Plaintiffs: *Markby, Tarry, & Stewart.*
Solicitors for Defendant: *Shum, Crossman, & Crossman.*

(1) 38 L. J. (Ch.) 331 (2) Law Rep. 9 Ch. 525.
(3) 39 L. J. (Ch.) 73.

C. A.
1876
July 29; Aug. 2.

FOX *v.* BUCKLEY.

Breach of Trust—Devise—Trustee—Legal Estate.

A testator devised certain real estate for life to one of his executors and trustees: the devisee afterwards committed breaches of trust and then filed a petition for liquidation:—

Held (affirming the decision of the Vice-Chancellor of the Palatine Court), that, as against the trustee in the liquidation, the life estate of the executor and trustee being legal, could not be taken and applied in replacing losses occasioned by the breaches of trust.

Statement.

EDMUND BUCKLEY, of *Manchester*, by his will, dated the 9th day of December, 1856, after making sundry dispositions of real and personal estate, gave and devised all the freehold lands and hereditaments not thereinbefore specifically devised of which he was competent to dispose unto his executors, Sir *Edmund Buckley* (therein called *Edmund Peck*), *W. Mallalieu*, *T. B. Jervis*, and *J. N. Lees*, their heirs and assigns, to the use of Sir *Edmund Buckley* and his assigns during his life without impeachment of waste, with divers remainders over. The testator made several codicils relating to a sum of £20,000 and appointing *G. H. Rushton* executor instead of *J. N. Lees*, and died in January, 1867. His will was proved by Sir *Edmund Buckley*, *W. Mallalieu*, *T. B. Jervis*, and *G. H. Rushton*, who possessed themselves of the personal estate to a large amount, but failed to provide for certain legacies and annuities given by the will of the testator. The other executors permitted the whole control of the estate to fall into the hands of Sir *E. Buckley*, and were dead. Sir *E. Buckley* had, in pursuance of powers of sale, sold divers parts of the real estate devised in trust, and had with part of the proceeds bought other real estate, but had applied other part to his own personal use. In March, 1876, *C. B. Smith* was by Sir *E. Buckley* appointed trustee of the will.

On the 19th of May, 1876, Sir *E. Buckley* filed his petition for liquidation by arrangement in the County Court of *Lancashire*, and *J. Halliday* was duly appointed trustee of his estate and effects.

The Plaintiffs, who were entitled to the legacy of £20,000, and to other benefits under the will, filed a bill in the Chancery of the County Palatine of *Lancaster* against Sir *E. Buckley*, *C. B. Smith*, the executors of the deceased executors, and the trustee of the liquidation, stating as above mentioned, and that Sir *E. Buckley* had deliberately violated the trusts and directions contained in the will and codicils, and praying for administration of the testator's estate, and for accounts and a receiver.

A motion for a receiver was made in the suit before *Little*, Vice-Chancellor of the County Palatine of *Lancaster*, and the Plaintiffs sought to make the order extend to the estates legally devised to Sir *Edmund Buckley* for life. This was opposed by the trustee under the liquidation, and the Vice-Chancellor refused to make the order extend to the estates of which Sir *E. Buckley* was legal tenant for life (1).

(1) 1876. July 11.

Little, V.C., said that it was not disputed that Sir *E. Buckley*, in his character of executor and trustee, had committed breaches of trust, and that his beneficial interest in the trust property was liable to be applied towards the making good of his breaches of trust. The only question was, whether the property legally devised to him was subject to the same liability.

The question was materially different from that which had often been before the Court of Chancery as to the right to impound or stop the beneficial interest of a defaulting trustee in order to make good a breach of trust committed by him. In those cases there was something to be done in the administration of the trusts or of the assets, and the Court took that occasion to oblige any claimant upon the estate to satisfy his obligations before he was allowed to withdraw anything from it. But a legal devisee took instanter on the testator's death, and if the devisee was indebted to the testator the debt could not be treated as forming a lien on the devise: *Ex parte Barff* (De G. 613); and it seemed somewhat singular that if a debt due to the testator himself did not constitute a lien on the estate, a debt accruing to the testator's estate after his death should constitute a lien. No doubt the testator might so frame his will as to make the devised estate liable, but there was nothing of that kind in this will.

The argument was that the devise to Sir *E. Buckley* and his appointment as trustee having been made by the same instrument, the devise must be taken subject to the condition that the devisee would duly perform the duties of executor and trustee. If a legacy was annexed to the office, then the condition arose, because it was so expressed in the will; but if the gift was independent of the office, the office might be disclaimed, and the legacy might be accepted. It could not be contended that the legal devise was in any way connected with the office of executor or trustee, and the mere circumstance of the devisee afterwards incurring a debt to the estate could not qualify his devised estate.

The cases of *Waring* v. *Coventry* (2

C. A. 1876 — Fox v. Buckley. — Argument.

The Plaintiff appealed.

Ince, Q.C., and *Everitt*, for the Appellants:—

The Court will intercept the interest of a defaulting trustee. There is no doubt that this principle applies when his estate is equitable, and there is no reason why it should not apply when the estate is legal. He takes the benefit and must take the onus: *Priddy* v. *Rose* (1). In *Woodyatt* v. *Gresley* (2) a legal estate was impounded. *Waring* v. *Coventry* (3) and *Coote* v. *O'Reilly* (4) apply. No doubt *Egbert* v. *Butter* (5) is against us, but is not binding on this Court. *Ex parte Barff* (6) and *Jacubs* v. *Rylance* (7) shew what the principle is. In *Hurst* v. *Hurst* (8) it was held that there was no difference when the estate is legal. He takes this estate with the trust annexed, and a man cannot sell part of an estate in breach of trust and keep the rest. The trustee in liquidation is not an assignee for valuable consideration, and can only take through the debtor.

Robinson, Q.C., *Stallard*, *E. S. Ford*, and *Bardswell*, for the other parties, were not called upon.

My. & K. 406) and *Coote* v. *O'Reilly* (1 J. & Lat. 455) had been referred to as cases in which liens on real estate were set up in order to make good breaches of trust by the devisee. But both cases could be referred to the doctrine that the tenant for life of an encumbered estate is bound to keep down the charges. The principal case relied on, however, was *Woodyatt* v. *Gresley* (8 Sim. 180). There, no doubt the Vice-Chancellor held that liability for breach of trust existed, but he put it entirely upon the law of contract; and it had been here contended that some such doctrine was to be here imputed, and that Sir *E. Buckley's* trustee could not approbate and reprobate, that is, take under an instrument and not perform the terms of the trust. But there was no necessary connection between the devise and the trust, and a liability such as was held to exist in *Woodyatt* v. *Gresley* could not be inferred from a subsequent transaction.

There was no authority for it, and *Egbert* v. *Butter* (21 Beav. 560) was an express authority the other way, which must be followed.

His Honour, however, regretted to be obliged to arrive at that conclusion, and would not be sorry if a different conclusion should be elsewhere arrived at. But according to the authorities, the receivership could not extend to the legal estates.

(1) 3 Mer. 86, 104.
(2) 8 Sim. 180.
(3) 2 My. & K. 406.
(4) 1 J. & Lat. 455.
(5) 21 Beav. 560.
(6) De G. 613.
(7) Law Rep. 17 Eq. 341.
(8) Ibid. 9 Ch. 762.

James, L.J. :—

In my opinion the order of the Vice-Chancellor of the County Palatine of *Lancaster* was the only order he could have made in this case. It is said that there is a conflict of authority, but there seems to be no authority whatever on the side of the Appellant, whilst *Egbert* v. *Butter* (1) seems to be an authority against him on the very point.

The other cases cited have no value whatever. *Woodyatt* v. *Gresley* (2) was entirely a matter of contract. The nearest case is *Ex parte Barff* (3), where there was a legal devise to a person who was indebted to the testator, and there the Vice-Chancellor *Knight Bruce* held that he had no power to charge the estate with the debt. The estate of a legal devisee is under no circumstances under the control of the Court. Sir *E. Buckley* was in no way a trustee of this estate; he might have sold it at any time, and it cannot be held that because he afterwards became indebted to the trust, a charge was thereby imposed on the estate. No doubt it is a hard case upon the family, but there are other persons interested, and the contest is in fact between two creditors. The appeal must be dismissed with costs.

Mellish, L.J., and Baggallay, J.A., concurred.

Solicitors for Appellants: *Emmet & Son,* agents for *A. & G. W. Fox, Manchester.*

Solicitors for Respondents: *Phelps & Sidgwick.*

(1) 21 Beav. 560. (2) 8 Sim. 180.
(3) De G. 613.

C. A.
1876
M. R.
May 20;
June 2.
C. A.
June 24.

DYMOND *v.* CROFT.

[1876 D. 46.]

Practice—Judicature Acts—Indorsement of Writ—Substituted Service—Default of Appearance and Pleading—Motion for Judgment—Delivery of Notice by filing—Foreclosure Suit—Order for Payment—Rules of Court, 1875, Order XIII., *r.* 9; XIX., *rr.* 6, 13; XXIX., *r.* 10; LIII., *r.* 3.

Held, by the Master of the Rolls, that a notice of motion for judgment is a document which may be delivered, in case a Defendant does not appear, by filing it with the proper officer pursuant to Rules of Court, 1875, Order XIX., rule 6:

Held, also, by the Master of the Rolls, that an order for personal payment may be combined with an order for foreclosure.

Held, by Court of Appeal (reversing *Jessel*, M.R.), that Order IX., rule 13, as to indorsing date of service on writ does not apply to cases of substituted service.

Statement.

THIS was an action for foreclosure of a mortgage.

The writ was issued on the 2nd of March, 1876. On the 21st of March an order was made for substituted service on a former solicitor of the Defendant, and by post to Defendant's last address. Service was effected accordingly. The Defendant did not appear, and an affidavit of service was filed on the 22nd of April.

On the 27th of April the Plaintiff filed a statement of claim. The claim was for an account, that the Defendant might be ordered personally to pay the amount found due and costs, and, in default, foreclosure. On the 12th of May the Plaintiff filed a notice of a motion for the 16th of May that judgment might be entered for the Plaintiff in the terms of the statement of claim. The action had been set down on this motion for judgment, and now came on to be heard.

Argument.

Cozens-Hardy, for the Plaintiff:—

In consequence of the remarks made by Vice-Chancellor *Hall* in *Cook* v. *Dey* (1), doubts have arisen whether notice of motion for judgment is a document which can be filed in accordance with Order XIX., rule 6. The Vice-Chancellor appears to have been

(1) W. N. 25 March, 1876.

impressed with the terms of Order LIII., rule 3, which provides that no motion shall be made without previous notice to the parties affected thereby; but that Order must be read along with Order XIX., rule 6, which provides the means of giving notice to a party who does not appear, viz., by filing the notice, which, according to the usual practice, is in writing and therefore a "document," with the proper officer. In a previous case of *Shephard* v. *Beane* (1) the same Vice-Chancellor held that notice of judgment might be filed with the proper officer.

JESSEL, M.R.:— Judgment, M.R.

If this point had been fully argued before Vice-Chancellor *Hall*, and had been finally decided by him, I should be slow to differ from him; but I am not satisfied either that it was fully argued or that his decision was final.

The scheme of the rules is this: in what may be called common law actions, such as actions for debt or recovery of land, if a Defendant does not appear, the Plaintiff is to have judgment just as he had at law before the Judicature Acts came into operation. But in cases assigned to the Chancery Division this cannot be done, because these cases are of so complicated a nature that the intervention of the Court is necessary in order to determine what the proper order is. Therefore, instead of allowing the Plaintiff to sign judgment, as in cases of debt and ejectment, it is provided by Order XIII., rule 9, that in actions assigned to the Chancery Division, and also in probate actions (for of course you could not allow a man to prove any will he might choose to set up), if the party served with the writ does not appear, the action may proceed as if he had appeared. Then, in order to avoid the necessity of obtaining an order for substituted service every time a step is taken in the cause, Order XIX., rule 6, provides that if no appearance is entered for any party, any pleading or document required to be delivered to him shall be delivered by being filed with the proper officer; so that if the party who does not appear wishes to know what is being done, he must go to the office and find out. The object of that is not to put the Plaintiff to trouble—for in

(1) 2 Ch. D. 223.

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dealing with an absent Defendant he ought not to be put to any unnecessary trouble—but in order that the Court may see that the proper order is made.

Now in this case the Plaintiff has delivered a statement of claim by filing it with the proper officer; the Defendant has made default in pleading, and the Plaintiff is entitled to set down the action on motion for judgment under Order XXIX, rule 10. In order to do that, he must, under Order LIII., rule 3, give notice of the motion to the party affected. How is that done? According to the ordinary course of practice the notice is given in writing, and a notice in writing is a document, and the mode of serving it is prescribed by Order XIX., rule 6. If a Defendant appears by a solicitor, the notice is served by being delivered to the solicitor; if he does not appear, then it is to be filed with the proper officer. What has been done here appears to me to be entirely in accordance with the rules, and I shall therefore make an order in accordance with the notice of motion.

The Registrar declined to draw up the judgment, because the date of service had not been indorsed on the writ pursuant to Order IX., rule 13.

June 2. *Cozens-Hardy*, for the Plaintiff, mentioned the point to the Master of the Rolls, and submitted that the indorsement was not necessary where an order for substituted service had been made: *Cruse* v. *Kuttingell* (before *Huddleston*, B., in Chambers, Dec. 15, 1875).

JESSEL, M.R.:—

I decline to follow the decision in *Cruse* v. *Kuttingell*. The rule says plainly that "the person serving a writ of summons shall, within three days at most after such service, indorse on the writ the day of the month and week of the service thereof, otherwise the Plaintiff shall not be at liberty to proceed by default." I am of opinion that the word "service" in the rule means every kind

of service, including substituted service. The Plaintiff must begin again.

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June 24. The case was now mentioned to the Court of Appeal.

C. A. Argument.

Cozens-Hardy, for the Plaintiff:—

The decision in *Cruse* v. *Kuttingell* has been followed by the Judges in Chambers. Order IX., rule 13, is copied from sect. 15 of the *Common Law Procedure Act*, 1852, under which there was no such thing as substituted service. At any rate, the Court can, under Order LIX., dispense with strict compliance with the rules. It is difficult to see how any injustice can be done to the Defendant, as he would never know whether the indorsement had been made or not.

JAMES, L.J.:— Judgment, C. A. James, L.J.

What my decision would have been if this point had come before me in the first instance I need not say. The rule has already been construed by *Huddleston*, B., in accordance with what seems to have been the general understanding of the Judges in Chambers, and it is very important that there should be uniformity of decision. I think it is desirable that the view of *Huddleston*, B., should be adopted.

BAGGALLAY, J.A., concurred. Baggallay, J.A.

LUSH, J.:— Lush, J.

I am of the same opinion. The 15th section of the *Common Law Procedure Act*, 1852, from which this rule is taken, applied only to personal service.

The Registrar in drawing up the order declined to insert an order for personal payment, as being contrary to the practice of the Court of Chancery in foreclosure suits.

Cozens-Hardy mentioned the matter to the Master of the Rolls,

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saying that under the Judicature Acts he was entitled to join an action on covenant with an action for foreclosure.

JESSEL, M.R.:—

Both forms of relief are expressly claimed. There is no reason now why they should not be combined, and the judgment may be drawn up accordingly.

MINUTES:—Order account of what due for principal, interest, and costs.

Order Defendant to pay to Plaintiff the amount to be certified within six calendar months from date of certificate.

On payment, Plaintiff to reconvey.

In default of payment by time aforesaid, Defendant to stand foreclosed.

Liberty to apply.

Solicitors: *Munton & Morris*, agents for *Samuel Johnson, Sheffield.*

C. A. 1876 *June* 1.

MORTON *v.* MILLER.

[1876 M. 57.]

Practice—Default of Appearance—Service by filing with Proper Officer—Rules of Court, 1875, *Order* XIX., *r.* 6.

A notice of motion for judgment is a document which may be delivered by filing it with the proper officer, under Order XIX., rule 6, as against a Defendant who has not appeared in the action.

Statement.

THIS was an action for foreclosure of a mortgage. The writ was issued out of the *Liverpool* District Registry, and duly served. Two only of the Defendants entered an appearance, and none delivered any statement of defence. The action was set down for hearing on motion for judgment, and notice of the motion and notice of setting the action down for hearing were served on the Defendants who had appeared. As regards the other Defendants, the notices were served by filing them with the Registrar of the *Liverpool* District. Vice-Chancellor *Malins*, having felt difficulty in holding the filing of these notices to be good service on account of the

conflicting decisions in *Cook* v. *Dey* (1) and *Dymond* v. *Croft* (2), desired that the point might be mentioned to the Court of Appeal.

Argument.

Charles Stewart for the Plaintiff:—

I submit that *Dymond* v. *Croft* is the decision that should be followed. The case is within the terms of Order XIX., rule 6, this being a document "required to be delivered."

[JAMES, L.J., referred to the introduction of the Order, treating it as consisting of rules as to pleading.

BAGGALLAY, J.A.:—The word "pleading" is used in a wide sense in the Rules, as is shewn by rules 17 and 19 of the same Order: "Any pleading, not being a petition or summons."]

It is quite reasonable that if a Defendant does not appear, it should be sufficient to leave documents at a place where he can at once find them.

Judgment, James, L.J.

JAMES, L.J.:—

I am of opinion that the view taken by the Master of the Rolls is the correct one. If any mischievous consequences are found to follow from this rule, a new one can be made. In the meantime we have only to construe it according to the fair meaning of its terms.

Baggallay, J.A.

BAGGALLAY, J.A., concurred.

Lush, J.

LUSH, J.:—

I am of the same opinion. I do not see to what documents the rule is to be held to refer, if not to such as the present.

Solicitors: *Walker, Son, & Field.*

(1) W. N. 25 March, 1876. 44 (2) *Ante*, p. 512.

M. R.

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Feb. 7.

KING *v.* FOXWELL.

[1874 K. 37.]

Domicil—Acquired Domicil—Naturalization—Abandonment of acquired Domicil—Reverter of Domicil of Origin.

In order to change his domicil of origin, a man must voluntarily fix his sole or principal residence in a country which is not his country of origin, with the intention of residing there for a period not limited as to time.

The domicil so acquired may be put an end to simply by abandoning it, without acquiring a new domicil of choice, and in such a case the domicil of origin reverts.

Statement.

CHARLES KING, the testator in this cause, was a native of *England*, and married his first wife there. He emigrated to *North America* in or about 1851, and settled at *Syracuse*, in the State of *New York*, in the *United States*, where he carried on business as a boot and shoe maker. His wife, whom he had left in *England*, joined him at *Syracuse*, and lived with her husband there down to 1863, when she died.

In 1854 *Charles King* filed in the proper Court of the State of *New York* a declaration of his intention to become a citizen of the *United States*, and renounce his allegiance to *Great Britain*; and in September, 1856, he was, by a rule entered in the minutes of the Court, duly admitted as a citizen of the *United States*. A certified copy of this rule was preserved by *Charles King* up to the time of his death.

In September, 1866, *Charles King* married his second wife, the Plaintiff in the cause, who was a widow then residing in *Syracuse*.

In April, 1867, *Charles King* returned to *England*, accompanied by the Plaintiff. He had previously (but at what exact date did not appear) sold his business and closed his banking account at *Syracuse*.

Towards the end of 1867 *Charles King* had a quarrel with the Plaintiff, who left him and went back to *America*. After she left, *Charles King* became ill, and went to live with one of his

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sisters, and resided with her until July, 1869, when the Plaintiff returned to *England*. *Charles King*, soon after he learned that the Plaintiff had returned, left his sister's house and travelled about, with the view of secreting himself from the Plaintiff, who was unable to find him, and returned to *America* in January, 1870. *Charles King* continued to travel about *England*, and in January, 1871, went to *Shepton Mallet*, his birth-place, where he made a will, by which he gave two small pecuniary legacies and disposed of the bulk of his property in favour of trustees for charitable purposes. He afterwards went to *Jersey* for the benefit of his health, and died suddenly in lodgings at *St. Helens* on the 24th of November, 1871.

The will of the testator having been proved in *England*, a bill was filed by the Plaintiff, alleging that testator was at the time of his death domiciled in the State of *New York;* that by the laws in force there the charitable dispositions contained in the will were void; and that the residue of the testator's personal estate was divisible between the Plaintiff and the next of kin of the testator living at his death; and praying for relief on that footing. The cause now came on to be heard, and the following questions were argued and decided separately: 1, whether the testator ever acquired a domicil in *New York;* 2, if so, whether he continued to be domiciled there up to the time of his death.

Argument.

Chitty, Q.C., and *Bevir*, for the Plaintiff:—

Before the *Alien Act*, 1870, it was impossible for a British subject to renounce his allegiance; but that has now been changed, and as the Act is retrospective (see sect. 6) it must be held that *Charles King* effectually became an American subject; he has done what has been held to be necessary in these cases to effect a change of domicil, viz., *exuere patriam: Moorhouse* v. *Lord* (1); *Udny* v. *Udny* (2); *Douglas* v. *Douglas* (3); *Haldane* v. *Eckford* (4). Besides, all the facts of the case shew that down to 1863 he had the intention of permanently residing in *America;* he did actually reside there, and consequently he acquired an American domicil.

(1) 10 H. L. C. 272.
(2) Law Rep. 1 H. L., Sc. 441.
(3) Law Rep. 12 Eq. 617.
(4) Ibid. 8 Eq. 631.

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Fischer, Q.C., and *Whitaker*, for the executors:—

It is true that *Charles King* resided for fifteen years in *America*, but he never had any intention of permanently residing there, and under these circumstances the length of residence is immaterial: *Story's* Conflict of Laws (1); *Hodgson* v. *De Beauchesne* (2). The attempt which he made to change his allegiance was inoperative, and cannot be taken into account.

Judgment.

JESSEL, M.R.:—

I have no doubt the testator acquired an American domicil; that is quite independent of the question whether he ever lost it.

What is domicil? I have had before me a great number of authorities, and the conclusion I draw is this, that in order that a man may change his domicil of origin he must choose a new domicil—the word "choose" indicates that the act is voluntary on his part—he must choose a new domicil by fixing his sole or principal residence in a new country (that is, a country which is not his country of origin), with the intention of residing there for a period not limited as to time.

You must therefore shew permanent residence in a new country. Neither of these is a simple fact, for I take it that all these questions of *status* involve a good deal more than can be seen by the eye. Residence is not eating, drinking, and sleeping at a particular house; all these things may be done, and done for years, while a person is travelling. On the other hand, a person may have a residence and yet not visit it for a great number of years; that may be his only residence, he may have no other home. It is therefore difficult to say what residence is: but that is what the law requires. Again, what is the meaning of permanent residence? That is a question which cannot be decided by mere length of time, the answer to it must involve the consideration of the intention of the person.

That being the state of the law, did this shoemaker intend to reside permanently in the *United States?* There can be no question as to residence; he had a shop and house at *Syracuse* for fifteen years, and during those years he had no other place of abode. Then did he reside there permanently, or was the intention on his part to reside for a limited period only? If you shew that a man

(1) Par. 44. (2) 12 Moo. P. C. 285.

resides in one place for a length of time, the inference is that he intends to reside there permanently, unless there is something to rebut it; and here, therefore, the testator having lived in the *United States* for fifteen years, must be taken to have resided there permanently unless some evidence is produced to the contrary. Not only is no evidence to the contrary produced, but all the facts point the other way. There is nothing whatever which would get rid of the presumption that he intended to reside there permanently from 1851 to 1866. It is true that in 1866 a letter is produced shewing a desire on his part to return to this country; but all the facts up to that time point to permanency of residence in the *United States*. I am of opinion, therefore, that he acquired an American domicil.

Judgment.

Chitty, Q.C., and *Bevir*, then contended that he never abandoned his American domicil. The evidence shewed that he carefully preserved his certificate of naturalization up to the time of his death, and always spoke of himself as being an American subject. He never intended to abandon his American domicil; his object in remaining in *England* was to separate himself from his wife; he never settled permanently in *England*. Under these circumstances he retained his American domicil: *Douglas* v. *Douglas* (1).

Argument.

Fischer, Q.C., and *Whitaker*, were not called on.

Bovill, Q.C., for the trustees under the will, took no part in the argument.

JESSEL, M.R.:—

Judgment.

The question I have now to decide is, whether the testator, having acquired an American domicil, abandoned it? Now a man having acquired a domicil of choice may abandon it, without it being incumbent on him to acquire a new domicil of choice; that is to say, he may abandon his domicil of choice without acquiring, in strictness, any new domicil; because his domicil of origin reverts. That doctrine is laid down by Lord *Westbury* in *Udny* v. *Udny* (2), and consequently all that has to be proved in this case is the abandonment of the American domicil; it is not incumbent on the

(1) Law Rep. 12 Eq. 617, 648. (2) Law Rep. 1 H. L., Sc. 441.

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Defendants to prove the acquisition of a new domicil of choice. I think that it is established that he abandoned his American domicil. There is no dispute as to what he did or what he wrote, the only dispute is as to what he said: and what he did and what he wrote are to my mind conclusive. He sold off all his property in *America*, he left the country, and his letters shew that he had no intention of returning. The evidence as to what he said is conflicting. I set off the statements on one side against those on the other, and upon the written evidence I come to the conclusion that he abandoned his American domicil; and the bill must, therefore, be dismissed, but, under the circumstances, without costs.

Solicitors: *Ewbank & Partington; Whitakers & Woolbert*, agents for *G. M. Mackay, Shepton Mallet.*

M. R. 1876 Feb. 26.

In re ARTHUR AVERAGE ASSOCIATION.

Mutual Marine Insurance Association—Winding-up Order, Error in—Costs—Outside Debts.

In 1870 an unregistered mutual marine insurance association was ordered to be wound up. Under the winding-up, debts to policy-holders were proved to the amount of £17,000, and debts in respect of rent of offices, goods supplied, &c., to the amount of £500; and a certificate was made finding these debts due from the association. In 1875, upon the application of contributories, the debts due to policy-holders were expunged from the certificate, but no application had been made to expunge those due to the outside creditors. Upon an application by the liquidator for a call of £135 upon each contributory for payment of the debts and costs of winding up, amounting to about £7000:—

Held, that a call must be made as asked:

Held, also, that so long as the certificate remained unimpeached, the Court could not treat the debts due to outside creditors as not being due from the association, even though the winding-up had been ordered under a mistake of law.

In re London Marine Insurance Association (1) commented on.

Statement.

THE *Arthur Average Association* was a mutual insurance association formed in 1867, not incorporated nor registered. Its rules, so far as it is necessary to state them, were as follows:—

"1. The members of this association severally and respectively,

(1) Law Rep. 8 Eq. 176.

and not jointly nor in partnership, nor the one for the other, but each only in his own name, do hereby agree to insure each other's ships for one year, from noon of any day named as the commencement of risk, against all losses, perils, and damages described in the form of policy hereto annexed, and subject to the conditions indorsed on the said form of policy and to these rules and regulations, which shall be binding and conclusive on all the members of the association. The managers of this association shall be *James Jackson* and *William Sheppard*, and either of them may sign their firm name of *Jackson & Sheppard* to all policies of insurance in the name of this association as the managers thereof, and the signatures thus given by either of the said managers shall be binding and conclusive on all the members of this association, and shall have on each and all of the said members the same legal effect as if each and every member had personally signed such policy. The said managers shall decide in what section any ship shall be included, the premium to be paid for the same and the allowance for laid-up premium. The value of the ship shall be indorsed on the policy.

"2. Ships classed in French *Veritas*, American *Lloyd's*, or any other authorized society's books for the classification of ships, may be admitted by computation according to corresponding class in British *Lloyd's*, and shall be divided into sections marked A, B, C, and so on successively, and paying different annual rates as agreed on at the time of entering the association, or at the commencement of any subsequent year on the sum insured. Premiums to be payable in advance by quarterly proportions by members' acceptance of managers' drafts at three months' date (if paid in cash discount of 5 per cent. per annum will be allowed), and to be placed to the credit of each respective member. Should their amount exceed the amount of claims for losses or damage sustained by the members during each year respectively, such excess shall stand to the credit of each mutual member proportionately as he may have contributed; and should it be that such contributions are not sufficient to meet the claims of members for loss or damage sustained within any respective year, then such credited amounts shall be applied to meet such deficiency; and should there still

M. R. 1876 *In re* ARTHUR AVERAGE ASSOCIATION. Statement.

be a deficiency, such sum as may be required to meet the same shall be drawn for on each respective mutual member in such proportion as they bear to each other.

"3. The managers shall also have authority to issue policies to members for periods less than a year, or for special risks either in time or voyage policies, in consideration of special rates of premium to be fixed by the said managers, to which the reserve fund shall in no way apply; also to allow brokerage and discount to insurance brokers."

These rules, with others which it is unnecessary to mention, were annexed to the ordinary mutual policies such as were mentioned in rule 1, and a person became a member by taking a mutual policy of that nature.

Special rate policies to a large amount were issued, under rule 3, to persons who were not holders of any of the ordinary mutual policies mentioned in rule 1. On the 29th of March, 1869, the managing committee made an alteration in the rules expressly sanctioning the issue of such special policies to persons not already members; but the alteration did not appear ever to have been confirmed by a general meeting, which was requisite to effect a valid alteration in the rules.

The policies issued were signed "*Jackson & Sheppard*, per procuration of the several members of the *Arthur Average Association* for insuring each other's ships, every member bearing his equal proportion according to the sums mutually assured therein, excepting members paying special rates." The rules were not annexed to the special rate policies.

On the 12th of February, 1870, an order was made for winding up the association. Messrs. *Cory* and *Hawkesley* were settled on the list of contributories in May, 1871. On the 20th of December, 1873, the Chief Clerk made a certificate finding upwards of £17,000 due to holders of special policies, among whom were *Hargrove & Co.*, who were not holders of any ordinary policies. This certificate was filed in January, 1874. In June, 1874, the official liquidator took out a summons for a call, and thereupon Messrs. *Cory* and *Hawkesley* took out a summons to have the debt of *Hargrove & Co.* expunged, although the time limited by Cons.

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Ord. xxxv., rule 52, had elapsed; and an order expunging the debt was made by the Master of the Rolls and affirmed on appeal (1).

The official liquidator now applied by summons that a call of £135 might be made on each of the contributories for the purpose of satisfying the debts of outside creditors and the costs of the winding-up, amounting to over £7000. The debts in question were incurred for such matters as rent of offices, goods supplied, &c., and amounted to about £500.

Argument.

Waller, Q.C., and *E. C. Willis*, for the liquidator.

Fry, Q.C., *North*, and *Hilbery*, for Messrs. *Cory* and *Hawkesley*, contended that no call ought to be made. The so-called debts to outside creditors were not debts of the association, but of the persons who took the offices or ordered the goods, &c.: *In re London Marine Insurance Association* (2). The result, therefore, was, that there was no debt in respect of which any one was liable to contribute, and a call ought not to be made merely for payment of costs.

Judgment.

JESSEL, M.R.:—

I entertain no doubt whatever as to what I ought to do in this case. The position, unquestionably, is a singular one, but it has been established by judicial decision which has been acquiesced in for years. This association, in my opinion, was not one association but a series of associations, but in 1870 it was ordered to be wound up as one association, and that winding-up order stands, and has not been interfered with. The members of the so-called association, or series of associations, have been put upon the list of contributories years ago, and remain upon that list, and cannot deny that they are contributories of the association so ordered to be wound up. The application is by the official liquidator under the winding-up for an order for a call for payment of the costs for winding-up, and what may be called the outside debts. If there is a winding-up, and if there are contributories, it is plain, on general principles, independently of any section of the Companies Acts, that the costs of the winding-up must be paid by the contribu-

(1) Law Rep. 10 Ch. 542. (2) Law Rep. 8 Eq. 176.

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tories. What do the words "the contributories" mean? The contributories are persons who have entered into a partnership, or *quasi* partnership, for commercial purposes, and with the view of ascertaining as between themselves the liability to contribution, a suit, or a proceeding in the nature of a suit, has been instituted, and the costs of it must, of course, be paid by those who get the benefit of the decision by which the partnership, or *quasi* partnership, of which they are members, has been wound up. Therefore the contributories must pay the costs.

Then another point was raised. There are certain creditors of the association—that is, persons who have been allowed years ago to prove their debts—whose debts have been duly certified by certificate years ago, which certificate has not been disturbed. The persons who appear now by Mr. *Fry* and Mr. *North*, as counsel, are contributories who still remain upon the list, but who have been within the last year active in expunging debts which have been proved and certified, and in the contest as to which they were successful, though there was a long delay even in attempting to expunge those debts. But these very persons have not attempted to expunge the debts now in question, which are called the general debts of the association. Therefore I presume they are satisfied that these debts could not be expunged, because, having had every opportunity of canvassing the list of debts, they have not attempted to interfere with them.

That being so, how can I say these are not debts of the association? I cannot go behind the certificate, which has remained undisturbed as regards these debts. I cannot say that they were a series of associations, and that by no legal possibility could these debts be the debts of every one of them. Nor can I ascertain, as between the members of any one of the series of associations, whether some particular members are liable to the exclusion of others, because, if that were so, they ought not to be debts proved against the association at all. Therefore, the debts remaining proved, I must hold, and I do hold, that they are debts of the association, which for this purpose is one association, and, consequently, that the contributories of the one association which is before me upon the winding-up order must contribute to the payment of those debts.

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That ought to conclude the question, and would conclude the question were it not for the case of *In re London Marine Association* (1), decided by Lord Justice, then Vice-Chancellor, *James* in 1869. It appears from the report that that case was in many respects similar to this. Debts of outside creditors had been proved against the association which was being wound up. The Vice-Chancellor is reported to have said: "With respect to those" (that is, the debts of outside creditors), "if any such debt was contracted, it is not a debt due from the association as such." If so, it could not be proved at all, and there would be a ground for expunging the proof. But His Honour's attention does not seem to have been directed to the fact that it was proved and not expunged, and there being no attempt to expunge it, he was bound by the certificate, and it was a debt of the association as far as he was concerned. In point of fact he could not have considered the question. Then he continues: "It is not a debt due from any member of the association, and every member is in the same position with respect to that, as a member of a club." Then he goes into the question with reference to clubs. In my opinion this association cannot be treated in the same way as an ordinary club, the constitution of which is familiar in London; but that does not go to this point. The Vice-Chancellor decided that the outside creditors were not creditors either of the association as such or of any member of it, and he says: "Whoever those creditors were, they were creditors of the persons upon whose order the work was done, the goods supplied, or the services rendered in the course of the affairs of this body. Therefore that is a liability to be ascertained. I do not know whether it can be ascertained here who were the persons who gave those orders. If they were given with the sanction of one of the general meetings, or of a committee authorized by one of these general meetings to give them, there must be some means of ascertaining the fact. I hold, however, that these creditors were creditors of the persons who gave the orders. A man who was a member in 1863 cannot be answerable for something that occurred in 1865 or 1864; and a man who was a member in 1864 cannot be answerable for that which was done in 1865, because that would be utterly inconsistent with the whole

(1) Law Rep. 8 Eq. 195.

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constitution of the body. Then I hold, upon that claim, that the official liquidator is not entitled to make a call with respect to that, at least not until he has ascertained who the particular persons are. It may be found convenient to ascertain in the winding-up what existing members of the company there were who made themselves liable for those particular debts. That seems to me to dispose of that part of the case." All I can say is, that the learned Judge appears there to have forgotten that he had nothing to decide. The certificate had decided that these debts were debts of the company wound up, and in the face of that certificate he had no right, as it appears to me, to say they were not debts. It might have been a very good ground on behalf of some of the contributories for asking to expunge these debts if the argument were in other respects well founded; but the debts standing, and having as in this case stood for years unexpunged, and having so stood although the opportunity was given to their opponents to go over the list of debts and elect what they would seek to expunge and what they would not, it seems to me impossible now to allow them to say that these debts have not been properly proved; at all events, that is not the object of the application before me. I consider I am bound by what has taken place. I consider these debts to be debts of the association, and that, therefore, every contributory whose name is on the list of contributories is liable to pay them, and the amount of them must be included in the call.

Then as to the amount of the call, I very much lament to see this result. Here is an association wound up under a mistake of law. It was supposed that the shipowners who had lost their ships were entitled to be paid by the persons who had agreed to pay them according to rateable contribution. It turns out that is a mistake in law, because the Act of Parliament says that a bargain of that kind, however reasonable and commendable in every other respect, is illegal unless it is made by an instrument to which certain names are affixed, which were not affixed in this case. The result, therefore, is, that at law there was no contract to indemnify the shipowners, and they were entitled to nothing. The attempt to get payment by means of a winding-up order has, unfortunately, wholly failed. That being so, the whole winding-up

proceeding has proved abortive, and nothing remains but to pay the costs of it.

Then it was said that the official liquidator, who is an accountant employed as an officer of the Court to conduct the winding-up proceedings, ought to have known more about the law than the Judge who made the winding-up order, or than the counsel or solicitors who were engaged in obtaining it, and who succeeded in appointing the official liquidator. It is said, also, that he ought to have been aware of the peculiar provisions of this Act of Parliament, and that this contract, or series of contracts, were not in law contracts however they appeared to be so in fact; that he ought, therefore, to have abstained from ascertaining what sum would be required, and from whom, to meet the liability to the debts which had been proved under these contracts, and remained proved until the year 1875, the winding-up having taken place in the year 1870, and the proofs having come in soon afterwards. All I can say is, I think there is no reason for depriving the official liquidator of his ordinary remuneration upon any such ground as that. He is merely the officer of the Court, who is appointed to carry out the winding-up. The winding-up appeared to be all right, the debts had been proved, and his duty was then to ascertain how they were to be paid, and nothing else. It would have been a breach of duty on his part even to have applied to the Court; he could not, as official liquidator, ask the Court to reconsider its order, even if he had been aware of the law, which he was not. He was the mere ministerial officer to carry out the orders of the Court. The answer to him would have been, "It is not your business to expunge these debts. You have admitted them under the advice of your solicitor, who may have mistaken the law; but there is nothing further in it than that." If it was the duty of anybody to apply to the Court, it was the contributories, who ought to have applied to the Court, and got rid of the order; but to suppose a ministerial officer, who happens to be paid, not by salary, but upon some other scale, is to lose his remuneration because he is not aware of the law affecting the case, appears to me to be rather an extravagant proposition. Therefore I see no ground for depriving him of his remuneration on account of his ignorance of the law.

But then it was said, at all events, after he knew of the objec-

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tion, he should have stayed his hand. It does appear, I am glad to say, as regards the facts of this case, that there was nothing substantial done after that. All he did after that was merely to attend to a correspondence, which he could not help attending to, and allow his clerks to shew the books, and so on, to those people who applied. In fact nothing substantial was done by him which was unnecessary after the notice, but I cannot even assent to the argument that he ought to have stayed his hand. He is like a receiver or manager, and it is not his business to stay proceedings. Anybody who wants to stay proceedings, and who is interested, should apply to the Judge to order such stay of proceedings. If the present parties, who asked to expunge the debts, thought their case was clear, and that no further expense should be incurred, they should have applied to the Judge to stay further proceedings, in order to avoid further expense in case they should turn out to be right. If it had been shewn to the Judge that they had such a plain case, the Judge would in all probability have complied with such an application; but I cannot under such circumstances hold that the official liquidator is to be mulcted in the loss of his fair remuneration properly earned because he did not stay the proceedings, and because he did not make such an application.

On these grounds, therefore, although I very much lament the enormous amount of the call, I feel myself compelled to make the call for the amount which has been named by the official liquidator. The only difficulty I have felt about it is as to the principle upon which the call should be made. The Court has no means of ascertaining how much each ought to pay, because there are no shares, and there are no policies, and all I can find out is that each man is a member and a contributory; under those circumstances I must make the call equal upon all. I see no other mode of distributing the call, and therefore I not only make it for the amount asked, but in the proportion asked, viz., £135 on each contributory.

Solicitors: *Blewitt & Tyler; Roberts & Barlow; F. W. & H. Hilbery.*

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[1875 P. 39.]

Jan. 17, 18, 24, 25, 26, 27, 28; *March* 2.

Letters Patent—Novelty—Prior Publication—Book in Patent Library—Specification—Anticipation—Sufficiency of Description, Tests of—Utility.

In 1865, letters patent for improvements in the construction of skates were granted to the agent of the alleged inventor, who was resident in *America*, and to whom they were afterwards assigned. Two years previously, an American work containing a brief description of the invention, and five weeks previously, a book of illustrations containing a drawing of it, were sent to the library of the Patent Office in *London*:—

Held, that the drawing was not so published that it could be referred to on the issue of novelty.

Sufficiency of the specification and of the description relied on as an anticipation considered.

Requisite amount of utility considered.

Statement.

THE Plaintiff, *James Leonard Plimpton*, was a citizen of the *United States of America*, who at the date of *Newton's* patent was residing in *America*, and at the time the suit was instituted, in *London*.

A patent, dated the 25th of August, 1865, was granted to *Alfred Vincent Newton* for an invention of "improvements in the construction of skates."

The invention was made and had been previously patented by *Plimpton* in 1863 in the *United States*, where he was then resident, and was afterwards repatented in the *United States* in 1866 in a modified form. *Newton's* patent was obtained on a communication from abroad, which in fact consisted in substance of a draft of the American specification and figures of 1866, which *Newton* adopted after introducing certain slight modifications. *Newton* acted merely as *Plimpton's* agent, and on the 10th of February, 1866, duly assigned the patent to him. The specification of *Newton's* patent, so far as material, was as follows:—

"This invention relates to an improvement in attaching the rollers or runners to the stock or foot-stand of the skate, whereby the rollers or runners are made to turn or cant by the rocking

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of the stock or foot-stand, so as to assume radii of a circle and facilitate the turning of the skate on the ice or floor, and admit of the skater performing with ease gyrations or revolutions without taxing unduly the muscles of the foot or ankles."

The specification then described in detail, by reference to drawings, the mode of construction of the skate, which was in substance as follows:—Two pairs of wheels or rollers were mounted on axles. Each axle worked in an axle-block, and each axle-block was connected with the skate-stock, so as to move with reference thereto about a fixed inclined axis; the axis belonging to the front axle inclining downwards and backwards from the stock, and that belonging to the rear axle inclining downwards and forwards. The description also specified certain india-rubber springs by which the action was checked. The specification then described a mode of making the skate applicable to ice by substituting flat discs called runners for the rollers. It described a mode of securing the runners by clamping them between pairs of discs, the outer one of each pair being made for ornament in the shape of a swan. The specification then proceeded as follows: "The runners, *I*, have smooth running surfaces with angular edges, so that they may be reversed when the inner edges lose their angularity by wear and a fresh sharp edge obtained, and when both edges of one surface become worn the runner may be inverted and two more angular or sharp edges obtained. Thus each runner has four angular edges, which may be successively used before the runner will require to be sharpened."

This passage in the specification (referred to hereafter as "the cited passage") was the only one which, directly or indirectly, suggested that the runners were to be set otherwise than parallel to each other, in vertical planes. The drawings gave no cross section of the runner skate to shew whether the runners were to be vertical or inclined; but the view of the skate from below given in the American specification shewed a shaded oblique view of each swan, which some of the witnesses considered as an indication that the swans were to be in an inclined instead of a vertical plane. This view of the swans was omitted in *Newton's* figures, and lines representing a cross section substituted. There

was some difference of opinion between the witnesses as to whether the lines indicating the runners in *Newton's* figures did not differ in thickness so as to indicate a slight inclination of the runners to the vertical. The witnesses differed, as hereinafter stated, as to the inference to be drawn in this respect, either from the figures annexed to the American specification or from the slightly modified figures annexed to *Newton's* specification.

Newton's specification concluded with a claim as follows:—"Under the above letters patent, I claim, first, applying rollers or runners to the stock or foot-stand of a skate, as described, so that the said rollers or runners may be cramped or turned so as to cause the skate to run in a curved line either to the right or left by the turning, canting, or tilting of the stock or foot-stand. Second, the mode of securing the runners and making them reversible, as above described."

The Defendant was selling roller skates having the axle-blocks moveable about fixed inclined axes similar to those of the Plaintiff, but with a steel spring substituted for the india-rubber spring, and producing a similar effect.

The Defendant admitted the utility of Plaintiff's roller skates, but contended that some parts of the alleged invention were useless, and that the specification was bad on those and other grounds. Novelty and infringement were also in issue.

The Defendant's particulars of prior publication were as follows:—"The alleged invention was published in *England* in a number of a periodical publication called *The Commissioners of Patents' Journal*, dated and published the 6th of February, 1863, a copy of which number was placed in the Patent Office library on the day of publication, and had been there open to the inspection of the public from that date. The said journal was also largely circulated in *England*, and many copies of the said number were sold to various persons and libraries in *England* before the date of the letters patent. The alleged invention was also published in a number of a periodical work called the *Scientific American*, dated and published January 24, 1863 (1), which had been imported into *England* before the date of the letters patent, and in

(1) Page 60.

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particular, one copy was received at the Patent Office Library in February, 1863, and had been there open for public inspection. It was also published in the form of a sketch forming one of the illustrations to the Report of the Commissioners of Patents of the *United States of America* in the year 1863, which sketch was placed in the Patent Office Library in *London*, in July, 1865, and was there open to public inspection. The sketch was a copy of the one in the specification of the American patent, and was identified by the like number."

The following is the description of the skate from the said number of the *Scientific American*:—

"37,305.—Skate.—*J. L. Plimpton, New York* City.

"I claim, first, the attaching or applying of the rollers, *E*, or runners, *E*, to the stock or foot-stand, *A*, of a skate in such a manner that said rollers or runners will be turned, cramped, or adjusted so as to run the skate in a curved line to the right or left by the turning or canting of the foot-stand or stock, *A*, as set forth.

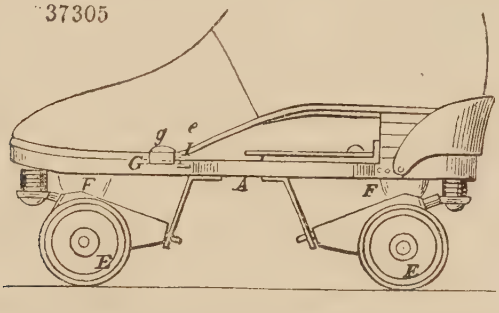
"Second. The plate, *H H*, provided with hooks, *g*, at their ends and racks, *f*, at their front edges, in combination with the spring, *I*, and plate, *G*, the latter being applied to the stock or foot-stand, *A*, and provided with slots, *e*, at its ends, and all arranged, as shewn, to form a fastening at the front end of the skate, as herein shewn and described."

"[This invention relates to an improvement in the attaching of the rollers or runners to the skate, whereby the former are made to turn or cramp like the wheels of a waggon and facilitate the turning of the skate—there being two pairs of rollers or runners to each skate. The invention also relates to an improved fastening for securing the front part of the boot or shoe to the skate.]"

The same description, omitting the last paragraph, appeared in the number of the *Commissioners of Patents' Journal* before referred to.

The following is a copy of the sketch above referred to which was contained in a volume of a work published by *Jewitt*, of

Buffalo, U.S., containing illustrations of American patents taken from the Report of the American Patent Commissioners for 1863:—



The Defendant also denied the Plaintiff's allegation as to the novelty of his invention, on the ground that the skates with india-rubber rollers commonly used long before did enable the skater, by the pressure of his foot and the tilting or canting over of his body, to cause the skate to move in a curve; and such skater did so move, though the means employed were different from the Plaintiff's. The answer contained the following passage on this point: "The means used in the Plaintiff's alleged invention are a mechanical connection whereby the rotation of the skate stock about a horizontal axis produces a rotation of the roller axles about a vertical axis. There was no novelty whatever in such a mechanical connection, which is, and has been for a long time anterior to the Plaintiff's alleged invention and the letters patent of the said *A. V. Newton*, among the well-known means of converting circular motion about one axis into circular motion about another. If there was any novelty in the Plaintiff's alleged invention when first made in *America*, it consisted simply in the idea that it would be a good thing to have a mechanical connection between the rotation of the skate stock and the rotation of the rollers, instead of trusting to friction and yielding of elastic rollers to produce the curvilinear motion as had previously been usual; but I submit that such idea would not be the subject of a patent. Any reasonably skilful mechanic could, without any assistance from the Plaintiff's alleged invention, or the said specification of *A. V. Newton*, effect such mechanical connection in any one of several known ways. The idea of using a mechanical connection for this

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purpose, and the nature and details of the Plaintiff's method, had been published in *England*, as aforesaid, before the date of the said letters patent. The method by which the Plaintiff effects the mechanical connection is such that the rollers are ranged in pairs, two pairs being placed under each skate on axles which, when the skate is at rest, are parallel to each other, and that the rollers are applied to the skates in such a manner that the skater can, by tilting the skates laterally by the pressure of the foot, turn to the right or left at will, and perform curves and evolutions, not with the greatest ease, but, after practice, with considerable facility. The description so given, however, includes every conceivable method of converting the rotation of the skate stock into rotation of the rollers, and would be applicable to skates very different from those described in the said specification of *A. V. Newton*. If the said specification claims every skate which would fall within this description, it is, as I submit, bad, as claiming too much."

By an order made in the cause, dated the 24th of June, 1875, it was directed that the following questions of fact be tried before the Court itself without a jury:—

1. Was *Alfred Vincent Newton* the first importer into Her Majesty's realm of the invention for which the letters patent of the 25th of August, 1865, were granted?

2. Was the invention new within Her Majesty's realm at the date of the letters patent?

3. Did the specification particularly ascertain and describe the nature of the invention, and in what manner the same was to be performed?

4. Has the Defendant wrongfully, and in contravention of the said letters patent, used the said invention?

It was ordered that the Defendant should be at liberty under the third issue to dispute the utility of parts of the alleged invention although he had not raised the general issue as to utility.

The case now came on for hearing on these issues.

Argument.

Matthews, Q.C., *Aston*, Q.C., *Waller*, Q.C., and *Lawson*, for the Plaintiff:—

This patent was taken out by *Newton* in 1865 as agent for the Plaintiff, who received from the Plaintiff a specification and in-

structions from *America*, and corrected them to put them in proper shape to file here. Roller skates were not unknown either in *England* or *America* before that time, but the particular construction which is the subject of this patent was the Plaintiff's own invention. He had taken out previous patents in *America*, in which the same principle was applied. The principle is this: instead of having a fixed axis, there is a strong double metallic frame screwed to the foot-stock with two bearings; there is one at the upper end provided with a cup or cavity in which the journal can be pivoted, and a pivot at the other end forming the other bearing. Thus the roller frame has two corresponding points fixed relatively to the foot-stock. A journal at one end is inserted in the cup, and a circular bearing at the other end which carries on the other pivot—these two bearings playing freely on the fixed bearings. The result of this is motion about an inclined axis.

The essential features of the invention are, first, that in this skate you have the power of setting the axles of the rollers out of parallel—in other words, there is a converging power in the roller axles, the consequence of which is that the skate runs in a curve while bearing on all four rollers; secondly, you have a complete power of varying the convergence at your pleasure, making it greater or less according as the foot, and with it the foot-stand, is more or less inclined or tilted laterally right or left by a simple motion in a vertical plane, thus enabling you to perform figures of every kind; lastly, this converging power is produced by one simple motion of the foot or the foot-stock.

Another feature of this skate is an adjustable spring enabling the foot-stock to recover its position after it has been tilted over.

The Plaintiff has also applied the same construction to runner skates used upon ice by substituting four runners for the rollers, fixed firmly on the same axle-blocks, enabling the skater by the mere tilting of the foot to make any variety of curves he may think fit.

There can be no doubt about the Defendant's infringement; indeed it is scarcely contested; but the Defendant, besides denying the sufficiency of *Newton's* specification, also disputes its novelty, alleging prior publication in this country; but we contend that the descriptions of the Plaintiff's invention contained in the

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Scientific American and the *Commissioners of Patents' Journal*, and in the sketch relied on, were never published within this realm, and further, that the descriptions are not sufficient to disclose this invention.

Hemming, Q.C., *Macrory*, and *Millar*, for the Defendant.

Evidence.

The case having been opened, the evidence was gone into, and, first, the Defendant's counsel were allowed to adduce evidence of prior publication.

R. B. Prosser, who had been employed in the library of the Patent Office for nearly twenty years, produced the number of the *Scientific American* of the 24th of January, 1863, and gave evidence to the following effect:—That when new books arrived they were entered by the librarian in a book or register and placed on the shelves, sometimes in the reading-room and sometimes in the other rooms of the library which were not accessible to the public; that the *Scientific American* was received at the library about a fortnight after publication, and would be placed on the table of the reading-room immediately afterwards; that a volume of illustrations accompanying the Report of the Commissioners of Patents for the year 1863 was received at the library on the 20th of July, 1865, but he could not say in what room it was first placed.

He also produced a volume of the *Commissioners of Patents' Journal* of the 6th of February, 1863, which he said, when published, was placed on the library table, and which was distributed gratis to all the free libraries in the country within a week after publication.

He also produced a volume of illustrations accompanying the Report of the Commissioners of Patents for the year 1863 on Arts and Manufactures (1), published by *Jewitt*, of *Buffalo, U.S.*, which appeared from a pencil entry made at the time by the witness to have been deposited in the library on the 20th of July, 1865, the American war having delayed its arrival. He stated that it was not entered in the register of donations; that he did not remember in what room it was put, but it certainly would be

(1) Vol. ii.

in the library if any one chose to ask for it. He had not the slightest doubt that the book was on the 20th of July, 1865, accessible to the public in the Patent Office library. He had not looked into the catalogue for an entry of the book, but such entries would not shew the times when they were made, nor could he say how long after the arrival of a book it would be before it would be put in the catalogue; the librarian made it up from time to time.

The Plaintiff's evidence was in substance as follows:—

Mr. *Alfred Newton* stated that he had received from *America* in 1865 a draft or copy of an American specification of *Plimpton's* skates with figures, that certain slight alterations were made by himself and his draftsman, and the specification and figures as altered were filed by him. He was of opinion that the figures both in the American draft specification and his own shewed the runners vertical, but said that he had come to produce the papers and not as a scientific witness, and had not considered the specification for years. He supposed his draftsman had left out the shaded swans as an absurdity. He considered that the invention was new in *England* in 1865.

Mr. *F. J. Bramwell,* President of the Institution of Mechanical Engineers, said he knew no earlier skate in which the curved path was obtained by making the roller axles converge. The arrangement of the two inclined axes for giving this convergence was a device which he had never met with for any purpose. He did not recollect any machine in which that kind of transmitted motion was combined in that simple way—at any rate, it was new in skates. *Malcolmson's* skate had the same apparatus for causing convergence, and a metal spring instead of an india-rubber spring. The two were substantially the same. The device of the inclined axis was there, and the convergence of the roller axles was produced by identically the same mechanical means.

On the question of prior publication he said that the letterpress in the *Scientific American* shewed only that the rollers would in some way adjust themselves to run in a curve, but gave no indication of the means by which the object of the invention was to be attained. The words "like the wheels of a waggon" would well convey in 1865 that there should be a sort of perch-pin. Coupling the sketch with the description, he would have looked for a vertical

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axle somewhere in *F*. He said that the ring round the vertical cylinder near the toe forbad him to read the sketch as shewing an inclined axle. He did not think there could be rotation without the ring rotating. On being asked if the axle-block could not rotate consistently with the drawing without the ring rotating, if there were a hole in the block and a fixed pin, he admitted that it could, and said he thought it would be an odd way, and it had not occurred to him before. In the sketch, *F* was a rounded lump. If he assumed an inclined axis that lump would stand in the way of any motion if rigid, and it must therefore be a substance not rigid which would recover its form when pressure was removed. Being asked whether, when he had once got an inclined axis, the lump *F* would not suggest to any competent person india-rubber as its material, he said, "I dare say it might;" but this would not be so if, as he considered, the sketch did not shew an inclined axis. On the question as to the runner skates, he said that the runners were vertical in the figures both of the American draft specification and of *Newton's* specification, but that *Newton's* figure omitted the swans. In the draft figure the swans were shewn foreshortened, but the runners were shewn vertical, and the plate *R* was also shewn vertical. If he was told to take it that the plates were inclined, he should say there was a trifling error in the figure. With the swans in, he should conclude that the thing as a whole was canted, and that the draftsman had left out the line; that "would be his conclusion—very likely a wrong one." The cited passage being read, the witness said that with that and *Newton's* figures before him he should have made the runners vertical, but with that and the American figures he should, after attentive study, have made them inclined, assuming an error in the draftsman in not shewing the runners as well as the swans inclined.

Mr. *Imray*, C.E., said that the cited passage told him very clearly that the runner must be slightly inclined, enough to make one edge wear before the other. By a slight inclination he meant "perhaps five or six degrees from the vertical, which would quite answer the purpose." Looking at *Newton's* figures only, he would imagine that the runners would be vertical; but taking the whole specification with the figures, a skate-maker would make them inclined, but no one would put them in at a great inclination—

probably it would be five or six degrees—just enough to give a bearing on the edge instead of the flat face. A man might put them in at a great angle if he thought it necessary. There would be no contradiction of the pictures, because a man does not expect to see foreshortening in such figures. He thought five or six degrees of inclination might give bite enough to enable a man to skate, though the horizontal pressure on the ice might rise, say, to eighty pounds, but it was so long since he skated that he could not say he knew that would be so. With reference to the prior publication, the witness said he agreed with Mr. *Bramwell's* interpretation that the sketch pointed to a perch-pin. He read the *Scientific American* as saying that the "turning, cramping, or adjusting" of the rollers was a mechanical consequence of the "turning or canting of the foot-stand or stock." He also testified to the identity in principle of *Malcolmson's* and *Plimpton's* skates, and said that not only was *Plimpton's* use of the inclined axis new in 1865, but that with large experience of machinery he did not at the present time know of any machine, except *Plimpton's* skates and subsequent roller skates embodying the same idea, in which a similar motion was employed.

Mr. *Plimpton* said that he had used runner skates on ice, that he could skate with vertical runners as well as with inclined runners if the vertical runners were fluted at the bottom. He had made runner skates in *America* and skated on them in 1863. His daughters had skated on runner skates in *New York*. Runner skates had never been brought to *England* or made here. He had had some made before taking out his patent of 1866 in *America*, and the ~~Defendant's~~ specification sent to *Newton* was, he thought, prepared from the same model as those skates. He did not think that the workmen worked from the specification. The skates he skated on in 1863 in *America* generally had the runners inclined, but he made some (less than half-a-dozen) with vertical runners fluted like an ordinary fluted skate, that is, with a deep groove in the bottom, so as to make sharp edges. He could skate on vertical runners without fluting on ice soft enough to yield to pressure, but not on ordinary ice, unless the base of the runners was fluted with a deep groove. It would be absurd to

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expect skates to be used for any practical purpose on ice when you depended for your bite on the friction between a flat surface and ice. Where the runners were set vertically he got the bite by making a deep groove. Being asked what amount of inclination of the runners would be required for skating safely without fluting, the witness said he should judge twenty degrees. That would be a good practical thing. He could skate with runners at any less inclination, even at none at all, as he had before said, but that would depend on the condition of the ice. The skates his daughters skated on had runners inclined at "perhaps an angle of twenty degrees."

The Plaintiff also put in several models, the general character of which was that they agreed with *Jewitt's* sketch, but the convergence of the roller axles was not a mechanical consequence of the canting of the foot-stock with all four rollers on the ground, though one of the roller axles could be made to converge towards the other by lifting the rear rollers off the ground, and at the same time turning the skate stock about the point of attachment of the front axle-block. In one instance it was suggested by some witnesses that convergence could be obtained with all the rollers on the ground, but other witnesses said that this effect was deceptive, and was due to loose and wabbling work, and not to the construction of the model.

The evidence for the Defendant was in substance as follows:—

Mr. *E. A. Cowper*, member of the Council of the Institution of Civil Engineers and Mechanical Engineers, said that the *Scientific American* and *Jewitt's* drawing explained the construction of a skate in which the wheels were to turn on the ground like the wheels of a waggon, and that the mechanism for the purpose was shewn by the inclined pins or axles shewn in the drawing. If a workman made the thing shewn in the drawing and explained by the letterpress he could not fail to produce the effect. He would fail with the letterpress alone, because the means were not shewn, and would probably fail with the sketch alone because the object was not disclosed. The letterpress told the witness that the "turning, cramping or adjusting" of the rollers was a mechanical consequence of the "turning or canting" of the foot-stand. The

one motion was to cause the other, not merely to permit it. Then *Jewitt's* drawing shewed how that was to be done—shewed the inclined axis by which one motion caused the other. It was just the solution of the problem. If this were put into the hands of any competent skate-maker he would do it directly. He would have put in the inclined axis—he would have done so in 1865. The witness did not think it at all an odd arrangement to make the rotation about a fixed pin. It was the method adopted in every cart or carriage.

With reference to runner skates he said that the skate, if on vertical runners, would slip away on attempting to go in a curve, unless the ice were so soft that it sank in. A workman having *Newton's* specification would put the runners in vertically; it would require invention to make them inclined.

Mr. *George Edwards*, a machinist in the employ of Messrs. *Holzapfel & Co.* He was one of a class of seven or eight of the best workmen, who had equal wages, and others had less. He was instructed by the manager, Mr. *Pomeroy*, to make a machine from a description and sketch taken from the *Scientific American* and *Jewitt's* drawing. He produced a model having inclined axes, like *Plimpton's* skate, but without any springs or anything corresponding to the lump *F*. In the description supplied to him the words "like the wheels of a waggon" and "the turning of the skate" were underlined. He had no communication from Mr. *Pomeroy* except that *Pomeroy* read to him the letterpress and gave him that and the sketch, and told him to make it. He had never seen a roller skate before, and knew nothing about them except that he knew roller skates were used on rinks. Before completing the model he made a rough model which did not admit of rotation about an inclined axis, and would not work. He then loosened the bearings and made it work, and then he saw that an inclined axis was the right thing, and made his finished model in that form. He said he left out *F* because there was no letterpress referring to it, and he could not make it out. He had no communication on the subject from his first instructions until he had finished the final model. Mr. *Pomeroy* came and saw the rough model, but the witness could not remember what state it was then in, or whether Mr. *Pomeroy* took up the model, or anything that passed

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on that occasion. In cross-examination the following questions and answers occurred:—

Q. In the model which you have made, is there anything which is cramped like the wheels of a waggon?—*Ans.* No.

Q. Then you did not attach or propose to attach the rollers of the skates in a manner so that they may turn or cramp like the wheels of a waggon?—*Ans.* Yes, partly.

Q. That is what you intended to do?—*Ans.* Yes, in part.

Q. But then you have not done it in the model?—*Ans.* Yes.

Q. Then do you recall your other answer?—*Ans.* In part.

Q. You will modify your answer by telling me that you have there something which is cramped like the wheels of a waggon in part?—*Ans.* Not cramped—turned. I do not know what the word "cramped" means.

Q. Did you ever see the wheels of a waggon that turned on any other axis than a vertical axis?—*Ans.* No.

Q. Then besides not understanding the meaning of "cramped," you have not, in your model, proceeded to make your wheels turn like the wheels of a waggon?—*Ans.* No.

Q. You have departed from your instructions in that respect?—*Ans.* In part.

Q. Then did it occur to you that the direction given that you were to make the wheels turn like the wheels of a waggon was a wrong direction?—*Ans.* Yes.

Q. And you thought it necessary to correct that direction by your own intelligence, did not you?—*Ans.* I did not understand the word "cramping," consequently I could not.

The MASTER OF THE ROLLS:—"Turning," you are asked.

Q. You thought it necessary to correct the wrong direction here, that the wheels were to turn like the wheels of a waggon, and to apply your intelligence to do something else; is not that so?—*Ans.* Yes.

Q. And you did, by your own intelligence, devise another plan, did not you?—*Ans.* Yes, without departing from the drawings.

Mr. *Henry Botten*, a machinist, carrying on business for himself, was employed to work from the letterpress and sketch taken from the *Scientific American* and from *Jewitt*. He had no previous

knowledge of roller skates, and no other instructions. He made first a small model and took it to Defendant's solicitors, and a gentleman told him to make another. The witness asked if it was to be the same size, and was told it would be as well larger. The witness believed the gentleman was satisfied with the first model. He then made a larger model, and increased the length of the axles so as to make the foot-stock lock on the rollers. The first model also had slots not in the drawings, and the witness before making the second model saw that these were not required, and omitted them in the second model. In other respects the models were similar. Both had inclined axes, and neither had anything corresponding to the lump *F*, which the witness said did not seem to him to be necessary.

Mr. *R. C. May*, C.E., said that, looking at the *Scientific American* and the sketch in 1865, he should have found the inclined axis, and also that *F* was an elastic lump.

He considered that both the draft American specification and *Newton's*, with their respective figures, indicated that the runners and swans were to be vertical.

Mr. *Hulse*, mechanical engineer, formerly a partner in *Whitworth & Co.*, said that until last Thursday his mind was a blank on the subject of roller skates, except that he had seen in shop windows the old india-rubber skates with straight-line rollers. On that day a copy of the *Scientific American* and *Jewitt's* drawing was brought to his attention, and he understood it to mean that the horn-plates or axle-blocks were pivoted on inclined axes. *F.* perplexed him at first, but on pondering, he considered it was a stop which would be made elastic. "Turning like the wheels of a waggon" meant the wheels themselves turning, not the mechanism by which they turned. Had employed workmen largely to work from drawings and specifications, and had been a workman himself. A skilled mechanic accustomed to work from drawings would be able to make the skate from these materials; a mechanic employed merely to turn a lathe or work at a vice would not. An average skilled workman of general knowledge and experience would be able to do it. Reading drawings and specifications was like reading music at sight. Some men had an aptitude for it which others had not.

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With reference to the runner skates, the witness thought that a workman would first make the runners vertical, and when he found the inconsistency, would get further instructions. If he could not, some workmen would have resource enough to get over the inconsistency between the drawings and the letterpress, and would then incline the runners, limiting the inclination to the object of enabling the edges to be successively used. Three or four degrees he should think enough, but six at the outside. No workman would look to a view from below to see whether the runners were inclined or vertical. If you wanted to shew the inclination, the proper thing would be to give an end view. Being asked, in cross-examination, whether a workman would be likely to put the runners in sloped, he said he did not think one workman in a hundred would appreciate the language; he would make the mistake first, then he would find from the letterpress that the object of avoiding sharpening was not accomplished, and would conclude he had done wrong, and would do it again. This would puzzle him more than the 1865 description and sketch, because there the letterpress and drawings corresponded; here the letterpress and drawings were inconsistent. Nothing would trouble a workman more than that.

Evidence was also given that the *Scientific American* and *Jewitt's* drawings were read as shewing the inclined axis by another witness, *E. J. C. Welsh*, a mechanical engineer, who had no previous knowledge, and it was also proved that *Plimpton* skates without the india-rubber springs had been skated on with facility.

Argument.

Hemming, Q.C., for the Defendant :—

The Plaintiff's specification is ambiguous, and therefore void for uncertainty. It is a claim "for applying rollers or runners to the stock or foot-stand of the skate as described, so that the said rollers or runners may be cramped or turned so as to cause the skate to run in a curved line either to the right or left, by the turning, canting, or tilting laterally of the stock in foot-stand." These words leave it ambiguous whether the claim is for the whole machine and each part of it as new, or only for a combination including both the inclined axes and the india-rubber spring or buffer. If the latter, we have not infringed; but if the claim is

read as asserting novelty in the inclined axes, we have; and in that case we shall succeed on the novelty issue if we prove that any skate with an inclined axis was published in *England* before the date of *Newton's* patent. There is a material difference between a combination patent and a patent for a machine: *Lister* v. *Leather* (1).

In *Holmes* v. *London and North Western Railway* (2), where *Harrison* had obtained letters patent for an invention for an improved turning-table for railway purposes, which he claimed as being "entirely new and never before used in the *United Kingdom*," it appeared that shortly before the patent was granted some one else had invented a turning-table which had some features common to this, but omitted an essential part of his invention, and it was held that the patent was not a good one, as the general claim amounted to a claim of novelty for every essential part of the machine not described as old.

[JESSEL, M.R.:—If the present form of claim had been put in, and if there had been a specification previously published containing the whole invention *minus* the buffer, this would be a bad specification for want of novelty.]

Then the result is that we have infringed, but that any skate with inclined axes on the principle of *Plimpton's* would be an anticipation, and I will argue the case on that footing.

The second objection to the specification is want of novelty. This is not "a new manufacture within the realm" so as to bring it within the operation of the *Statute of Monopolies* (21 Jac. 1, c. 3).

I contend that there had been a previous user in this country in this sense, that there had been a prior publication.

In the case of *Lang* v. *Gisborne* (3), where an invention was described in a book published in *France*, a few copies of which were sent to *England* to a bookseller for sale, it was held that this was a publication of the invention, and that no valid patent could afterwards be taken out in this country for the same invention. In that case only four copies appear to have been sold in *England*,

(1) 8 E. & B. 1004, 1017. (2) 12 C. B. 831; 1 Macrory, 5.
(3) 31 Beav. 133.

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and Lord *Romilly* observed: "It is not necessary to establish the fact that one copy has been sold, for I think that as soon as an inventor informs the public of what his publication consists, and prints it in a book which he sends to the publisher to sell, from the moment that the book is exposed to sale in the bookseller's shop there becomes in point of law a complete publication of the invention."

[*Aston*, Q.C., referred to *Heurteloup's Patent* (1).]

That case, so far as it goes, is in our favour.

Here we have an *à fortiori* case of prior publication, for the evidence shews that the *Scientific American* was in the library of the Patent Office, and was accessible to the whole of the public. That is the very place where the public interested in mechanical matters would go to find out what was done. This is, I submit, far more of a publication than putting a few copies of a French book for sale in the window of a bookseller's shop. Even if the book were not immediately put in the catalogue, it would not affect the question of publication, and there is no evidence to shew when it got into the catalogue. The description in the *Scientific American*, coupled with the drawing, would be sufficient to enable a man to make a skate, if not exactly like the Plaintiff's, yet with the one distinctive feature in it, namely, the inclined axis, which furnishes the ground of the Plaintiff's claim. In fact, there is such a description as would prevent any one subsequently taking out a patent. The question of the sufficiency of description was considered in *Young* v. *Fernie* (2), *Betts* v. *Menzies* (3), and *Neilson* v. *Betts* (4).

The evidence of the experts shews that the letterpress in the *Scientific American*, and the drawing together, would not only enable an ordinary skilled workman to make a skate with the inclined axis, but would also suggest, though that is not necessary for my case, that the india-rubber buffer might be added. The statement at the end of the description in the *Scientific American* is as follows:—"This invention relates to an improvement in the attaching of the rollers or runners to the skate, whereby the former are made to turn or cramp, like the wheels of a waggon,

(1) 1 Webs. P. R. 553.
(2) 4 Giff. 577.
(3) 10 H. L. C. 117.
(4) Law Rep. 5 H. L. 1.

and facilitate the turning of the skate, there being two pairs of rollers or runners to each skate." Any one looking at this would see that it is a part of the description of the invention. Then, looking at the description itself, we read that the inventor claims "the attaching or applying of the rollers or runners to the stock or foot-stand of a skate, in such a manner that the said rollers or runners," which on any fair construction must mean all four rollers, "will be turned, cramped, or adjusted, so as to run the skate in a curved line to the right or left by the turning or canting of the foot-stand or stock." By the word "will," I submit that the turning or canting of the foot-stock is stated to be the mechanical cause of the turning, cramping, or adjusting of the rollers. Further, it shews that these rollers are to run the skate in a curved line, as the mechanical consequence of the canting of the foot-stock, and the consequent cramping, turning, or adjusting of the rollers, and not merely to permit it so to run. An average workman could, it is proved, at any rate after a few trials, make a skate from this description and the drawing which would be practically the same as the Plaintiff's. The evidence shews that this has been done. And as to the sort of workman, sometimes described as an average workman, sometimes as a competent workman, to be taken as the test workman, I submit that the distinction is not between a man clever at reading specifications and a man indifferently stupid at that work, but between a man who brings reading-power to bear and a man who brings inventive power to bear. If you exclude every clever reader, you make it impossible to patent any very complicated machine, because a very complicated specification cannot be read by any but specially clever workmen. As to the models produced by the Plaintiff, they help our case, because they shew that the Plaintiffs, with the able assistance at their command, have only been able to produce an apparent resemblance to the sketch without the inclined axes, by introducing inofficious parts. Even then they cannot get convergence with all the rollers on the ground, and even on two rollers, the motion of the rollers is not mechanically connected with that of the foot-stock. They read the words "the said rollers" as meaning "two of the said rollers," and they read "will be turned" as if it were "may be turned."

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The only way in which my friends get out of this conclusion is by shutting their eyes to the important part of the letterpress which explains the sketch, and confining their attention to the clause which contains the words "like the wheels of a waggon." This is not, I submit, the way to look at it. You must look at the whole.

Next, I contend that the Plaintiff's specification is insufficient to shew a competent workman, without ambiguity, how to make one of the inventions which he claims, namely, that of a runner skate. It deals with roller skates and runner skates in the same way, and it claims to protect the use of the inclined axle in the runner skate just as in the roller skate. I submit the following as propositions of law:—First, where a specification relates to two different inventions, it is bad altogether if it fails to describe either the one or the other. Secondly, a specification is bad where it gives or suggests two methods of making a machine, one of which will succeed and the other fail. Thirdly, a patentee must shew not only a way of making his machine, but the best way of making it that he knows: *Rex* v. *Arkwright* (1); *Bovill* v. *Moore* (2). The case of *Neilson* v. *Harford* (3) also shews that even with respect to a small matter it is essential to give a sufficient description, and that the omission to give it in any particular will vitiate the patent.

[JESSEL, M.R.:—The law goes further, as stated by Baron *Alderson* in *Morgan* v. *Seaward* (4). "If a patentee is acquainted with any particular mode by which his invention may be most conveniently carried into effect, he ought to state it in his specification."]

Applying these principles to the Plaintiff's specification, an ordinary skilled workman, who would not otherwise know the meaning of a runner skate, for the thing has never been seen in *England*, could not from *Newton's* specification, including the drawings, discover that sufficient obliquity must be given to the runners to enable them to bite the ice. He omits, therefore, an essential part of the description. This appears from Mr. *Plimpton's*

(1) 1 Webs. P. R. 64.
(2) 2 Marsh. 211.
(3) 1 Webs. P. R. 295, 321.
(4) Ibid. 174.

own evidence, for, in answer to your Lordship's question, "What amount of inclination would be required for safely skating upon the runner—how many degrees?" he gave this answer: "I should judge 20°; I should say that 20° is quite practical." And, again, to the question, "For all ordinary purposes you would get the bite at 20°?" the answer is: "Yes, that would be a good practical thing."

This being the conclusion to which *Plimpton's* experience had led him, there is, nevertheless, not a hint in the specification that an inclination of 20°, or any other amount, is necessary. That knowledge he has not communicated, and therefore the specification is bad, even if we assume in the Plaintiff's favour that the specification does vaguely suggest an inclination sufficient to wear one edge before the other, which no witness puts higher than 6°. All the evidence shews that a workman would from this specification put the runners in, either vertical or with an inclination of not more than 6°, and that there is nothing to lead him to give such an inclination as is necessary to give the required bite. Without this the skate would not only not be in the best known form, but would be absolutely dangerous and useless. As Mr. *Plimpton* says, it would be absurd to put it forward as a practical thing.

In the next place, the patent in this country was taken out by *Newton* on a draft specification and sheet of figures received by him from abroad. He made some alterations in these and then took out the patent. If the alterations thus made were material, and he did not state what part was communicated from abroad and what was his own invention, the specification would not be good: *Renard* v. *Levenstein* (1); *Milligan* v. *Marsh* (2).

If *Newton* knew what *Plimpton* knew, and what I submit that the drawing and specifications sent over by *Plimpton* told him, namely, to give such inclination as would make the runners bite, then his patent is bad, because he has not disclosed the best mode of making the machine. If he did not know that, then I submit that his specification is bad, because he has described a machine which will not work without fresh experiment to improve it. Taking it either way, I submit that the specification is bad.

(1) 10 L. T. (N.S.) 177. (2) 2 Jur. (N.S.) 1083.

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Judgment.

Macrory, and *Millar*, on the same side.

JESSEL, M.R.:—

I do not wish to trouble you to reply, Mr. *Matthews*. Perhaps I am wrong in saying it, but I have for some time made up my mind on the case.

The issues which I have to try are what one might almost call the ordinary issues in a patent cause. The first is the issue of novelty, which assumes the double form of whether *Newton* was the importer, and whether the invention was new; but I take it that comes to the same thing, because the real question is whether it was new within the realm. That *Newton* was the man who took out the patent is certain; and, as far as I know, there is no law which says that if a man from abroad communicates to *A.*, who communicates to *B.*, *B.* may not take out the patent. Therefore, substantially, the first issue is that of novelty. The second issue is what we call sufficiency of specification. There is another issue, which is what we call the issue of infringement. There are, in fact, three issues.

I am not going to state in detail what the evidence is; and whoever reads my judgment will not expect to find in it an exact account either of the specification of the invention, or the evidence. I will give general results from memory, and state what I consider to be in substance what they amount to.

First of all, as regards the infringement. Mr. *Newton's* patent, in respect of which the Plaintiff, though he is the original inventor, merely sues as the assignee—is a patent taken out, on the 25th of August, 1865. Mr. *Malcolmson*, the Defendant, took out a patent—which I am sorry to say, appears to me, so far as this patent is concerned, to be a great abuse of the Patent Laws—in the year 1874. The original patent, that is, *Newton's* patent, was for a machine called a skate, either for a roller-skate or a runner-skate.

The invention, if I may say so, was twofold. There was a mode of making either a roller or a runner skate describe a curve, by merely a lateral pressure of the foot on the skate. That was the substance of it. It was a change of motion, or a conversion of motion. The lateral pressure of the foot of the skater was, by well-

known and mechanical means—such as levers and axles, and so on —communicated to the wheels in such a way that the axles of the wheels came out of parallelism, and converged round the centre of a circle. In other words, it was a change of one kind of motion to another kind of motion communicated to the wheels; and it enabled the skater, therefore, to move in curves upon a flat surface, and to move easily. That was the main object of that part of the invention. A subordinate part of the invention was this: It was desirable to some extent to regulate or check that conversion of motion; and for that purpose he put in an india-rubber spring, or buffer, as it has been called, which could be made stronger or weaker by tightening or loosening a screw. That was a subordinate part of the invention. The main part was the change of motion; the subordinate part was what I may call the regulating or moderating the motion. But the whole invention was a machine or skate which would work in this way to describe a curve easily and readily by the lateral pressure of the foot.

There was a second part of the invention, which was this: He applied the first part of the invention both to a roller skate, which had rollers and wheels mounted on an ordinary flat surface, and also a runner skate. He took off his rollers and wheels, and put in the place of them little pieces of metal with sharp edges, and they would adapt the skate to skating on ice. I do not suppose the skate was so much meant for skating on ice, because there is no difficulty with the common skate in making curves on ice—at least to a good skater. But, at the same time, no doubt this same kind of machinery, which readily produces the curves on a floor on which there was considerable friction, would produce curves on the ice; and there is no doubt you could skate on the ice with it, and so far it was a useful invention. But, in addition to that, he claimed something entirely different. He claimed this: If you have an ordinary skate, it has a long blade, if you may so call it, a piece of iron at the bottom; and if a little bit of grit or a stone caught it, it made a little notch, but you could go on skating. You need not send your skates to the grinders. But when you put little runners, as Mr. *Plimpton* did on to his skate, and then a stone or bit of grit caught the runner, this was so small it most likely would spoil the runner, and the consequence

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would be that you would have to stop skating and have your runner ground up again—so he adopted this device: He made a runner with four sharp edges, and he made it a moveable thing, so that it could screw in and out of the holders; and then, if any bit of grit spoiled one edge of the runner, you had nothing to do but to unscrew it and put another edge out, and all four edges could be used successively. The second invention claimed by the patent was a claim of these runners. I do not suppose Mr. *Plimpton* would have taken out a separate patent for it, but it was an invention that made the runner skate more valuable than it would otherwise have been, and, as far as I understand, it was new at the time. That is the second part.

Now, what he complains of as an infringement by the Defendant *Malcolmson*, of the first part of the invention, is of what I will call the conversion of motion. I do not know that I can describe it better. The mode in which he carried it out was by a very novel and ingenious application of a diagonal axis below the foot-stand of the skate, and this mode of carrying it out was not only new at the time (as appears from information given to me by the evidence of experts), as applied to a skate, but it was new altogether. It was a new mechanical contrivance, that is, that peculiar combination of known mechanical elements for producing this conversion of motion was a new mechanical contrivance. The Defendant *Malcolmson*, who, we may assume, was perfectly aware of *Newton's* patent, takes out a patent in 1874; and in his complete specification he describes what, to my mind, is exactly the same skate. When I say exactly, I mean in substance the same. It is the same skate, with a mere colourable variation. He has taken the whole of the mechanical contrivance, which was new, as the French would say, *en bloc*. He has simply taken it in. He has made a slight variation in this way. He has substituted for the india-rubber spring, or buffer—which was moveable in the sense that it could be tightened up or not by a screw, adaptable or adjustable in that sense, according to the wants of the skater—a steel spring, which is a mere mechanical equivalent. It is a little worse than the Plaintiff's expedient, because the steel spring cannot be adjusted by turning, and so made stronger or weaker. It is, therefore, a colourable variation for the worse; and, for this thing, which

is, in fact, the Plaintiff's invention, and nothing else, he has had the courage to take out a patent, and this is the patent which is complained of. The infringement is so palpable, so patent, and so obvious to everyone, that his very able counsel, who have argued the case with the greatest elaboration, did not think it worth while to address me on the subject, or contest the point of infringement. Therefore, upon that issue, of course, the verdict will be for the Plaintiff.

The next point is what I will call novelty. The Act of Parliament (21 Jac. 1, c. 3), on which all these patents are founded, tells us this: that to come within the exception of the *Statute of Monopolies*, a man who has the patent must be the first and true inventor, and he must describe something in his specification which is not already known and used. What is the meaning of a first and true inventor? To ascertain its meaning, you must have recourse, no doubt, to various decisions given on the statute, which is very nearly three hundred years old. It is not for a Judge of the present day to give his meaning as to what should be attributed to the words of the statute. He must take the construction put on the statute to be of the same effect, as guiding him to a correct decision, as if that construction had been enacted as part of the statute.

In order that those who may have to consider my judgment hereafter may know the view that I take of the statute combined with decisions, I will state the result at which I have arrived. As I understand, shortly after the passing of the statute, the question arose whether a man could be called a first and true inventor who, in the popular sense, had never invented anything, but who, having learned abroad (that is, out of the realm, in a foreign country, because it has been decided that *Scotland* is within the realm for this purpose) that somebody else had invented something, quietly copied the invention, and brought it over to this country, and then took out a patent. As I said before, in the popular sense he had invented nothing. But it was decided, and now, therefore, is the legal sense and meaning of the statute, that he was a first and true inventor within the statute, if the invention, being in other respects novel and useful, was not previously known in this country—"known" being used in that particular sense, as

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being part of what had been called the common or public knowledge of the country. That was the first thing. Then there was a second thing. Suppose there were two people, actual inventors in this country, who invented the same thing simultaneously, could either be said to be the first and true inventor? It was decided that the man who first took out the patent was the first and true inventor. Then there was another point. If the man who took out the patent was not, in popular language, the first and true inventor, because somebody had invented it before, but had not taken out a patent for it, would he still, in law, be the first and true inventor? It was decided he would, provided the invention of the first inventor had been kept secret, or, without being actually kept secret, had not been made known in such a way as to become a part of the common knowledge, or of the public stock of information. Therefore, in that case also, there was a person who was legally the first and true inventor, although, in common language, he was not, because one or more people had invented it before him, but had not sufficiently disclosed it.

It will be seen, that both as regards the man who brings in the invention from foreign parts, and the man who takes out a patent for an invention which had previously been discovered by somebody else, it is most material to consider what is meant by being known in the realm—being known in *England*. Here, again, we must have recourse to authority, and also must consider what the principle is that is to be deduced from the authorities. When you say a thing is known to the public and part of common knowledge, of course you do not mean that every individual member of the public knows it. That would be absurd. What is meant is that if it is a manufacture connected with a particular trade, the people in the trade shall know something about it; if it is a thing connected with a chemical invention, people conversant with chemistry shall know something about it. And it need not go so far as that. You need not shew that the bulk, or even a large number, of those people know it. If a sufficient number know it, or if the communication is such that a sufficient number may be presumed, or assumed, to know it, that will do. Now how are they to know it? They are to know it by being told of it, or informed of it in some way. You may shew that they

knew it, by shewing that the trade had commonly used it. That is the best evidence you can have. You may shew the thing was known because it was used and brought into practice, which is a case I have not now to consider. But you may shew they knew it in another way—that it was published, or made known to the public. I use the word "published" in that sense. How made known to the public? It has been held that if it is in a specification, certainly in a modern specification, which had been enrolled in the Patent Office, and not published besides, that will do. And it has also been held that, as a common rule, if the description has been printed in *England*, and published in *England*, in a book which circulates in *England*, that will do. But, after all, it is a question of fact. The Judge must decide, from the evidence brought before him, whether it has in fact been sufficiently published to come within the definition of being made known within the realm.

The cases cited may be rather used as illustrations of what will amount to sufficient evidence than as deciding anything in principle, beyond this, that it must be sufficiently known. There are not many cases which it has been necessary to refer to. But one or two are important. In the case of the *Household Coal and Iron Company* v. *Neilson* (1) the question was, What was the effect of publication in a book?—and Lord *Lyndhurst* says: "If the machine is published in a book, distinctly and clearly described, corresponding with the description in the specification of the patent, though it has never been actually worked, is not that an answer to the patent? It is continually the practice on trials for patents to read out of printed books, without reference to anything that has been done." When he says "in a book," he means published in this country. Lord *Brougham* says: "It negatives being the true and first inventor, which is as good as negativing the non-user. The book that is generally referred to is the *Repertory of the Arts and Sciences.* It must not be a foreign book, but published in *England.*" Therefore the decision comes to this, that in an ordinary case of a clear description of the invention in a book published in *England*, you will presume that it comes to the knowledge of, at all events, that portion of the public

(1) 1 Webs. P. R. 673, 718, n.

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interested in the subject-matter of the invention; and unless you can explain that, or get rid of it, that is sufficient evidence to destroy the patent. But that, again, must be taken with reference to the facts of the case.

In *Stead* v. *Williams* (1) the point came before the Court in a different way. Lord Chief Justice *Tindal*, in giving judgment, said: "On a full consideration of the subject, we have come to the conclusion that the view taken by the Defendants' counsel is substantially correct; for we think, if the invention has already been made public in *England*, by a description contained in a work, whether written or printed, which has been publicly circulated, in such case the patentee is not the first and true inventor within the meaning of the statute, whether he has himself borrowed his invention from such publication or not; because we think the public cannot be precluded from the right of using such information as they were already possessed of at the time the patent was granted." See how carefully it is put there. It must be published in a book made public in *England*. It must be publicly circulated, and it must give possession of the knowledge to the public.

The same point came before Mr. Baron *Parke* in *Stead* v. *Anderson* (2), where he said: "Has it been generally known and published? I think those words mean different things. 'Generally known' means known to the public generally, or, at least, to that portion of the public whose attention is turned to such matters. But 'published' means offered or dedicated to the public. Was the invention published or offered to the public to such an extent as that it was generally known amongst engineers and persons likely to take an interest in such a matter?" The case goes to this, that a book must be made public to such an extent as to be generally known among persons practising in such matters. It is, therefore, not merely publication, though, as a general rule, according to the *Household Coal and Iron Company* v. *Neilson* (3), when you say a book is published, and nobody contests it, you assume that several copies have been printed and circulated, unless somebody asserts the contrary. But, as regards the law, you must go a step further. Does that doctrine, therefore, apply

(1) 2 Webs. P. R. 126, 142. (2) 2 Webs. P. R. 147, 149.
(3) 1 Webs. P. R. 673, 718, n.

to a case of this kind? There is one copy of the book which is all that has ever been printed or published, and that copy of the book was always kept in the back-parlour of the bookseller's shop, and never was seen, as far as the evidence went. Would that satisfy the doctrine? Clearly not. Even although a book was published, and, in the technical sense, published in *England*, it does not satisfy the conditions; it has not become part of the public knowledge; it is not knowledge in the possession of the public. And, therefore, if in the cases I have cited the patentee had given evidence to shew that the day after the publication in *England* of 500 copies, 499 had been destroyed, and the remaining one had been put aside by the bookseller in his back-parlour, and never circulated, though if somebody had asked him he would have been willing to sell the book, I am satisfied, from what I have read of the opinion of those learned Judges, they would all have decided that that was not made publicly known, so as to be part of the public possession and part of the public knowledge.

But it is said there are cases the other way. As regards that I will first direct my attention to a case before the Privy Council. It is a French case, the name of which is *Heurteloup's Patent* (1). It was an application to the Privy Council under a remedial statute, which was this:—Where a man invented over again something which had been previously invented, if it were a very meritorious invention, and the Privy Council thought that it was really reintroducing to the public that which had been lost sight of, so to say, they could confirm the patent, and make it good, notwithstanding the prior patent: "This was an application under the 2nd section of the statute to confirm the letters patent granted on the 22nd of May, 1834, to the Petitioner, Baron *Heurteloup*, for improvements in certain parts of certain descriptions of firearms. There being no evidence of user of part of an invention contained in a published book, letters patent for such invention will be confirmed." Now it is to be observed that that is not an absolute decision that what had occurred would avoid the patent. I think it would have been within the province of the Privy Council to recommend a confirmation, even if they had thought the case fairly open to doubt. Confirmation is the

(1) 1 Webs. P. R. 553.

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object of the application. It is not necessary to infer that they thought it clear; but inasmuch as it would save the applicant litigation, I think they might have reasonably advised the Crown to confirm it, even if there was a doubt raised as to the validity of the patent. But, even assuming the other view to be correct, for unfortunately in these cases we do not know the grounds on which the learned Judges proceeded, there being no judgment, still I think the case does not militate in any way against the authorities to which I have referred, because there was in that case uncontradicted evidence of publication in the sense of being known to the public.

The material facts, so far as it is necessary to state them, were these: It was said that one *Valdahon* had taken out an invention. which included part of the invention of the applicant. *Valdahon* had taken it out in *France*. It was not known in *England* otherwise than by the introduction into *England* of books printed and published in *France* containing a description of the invention. Now that statement, unexplained and uncontradicted, was equivalent to a statement that many books or several books had been in *England*, and been freely circulated there, because it was known in *England* by the introduction into *England* of the books, and that was verified by the affidavit of the Petitioner. In addition to that, there was an affidavit by the Keeper of the Printed Books of the *British Museum*, stating that in 1832—that is, two years before—twenty volumes of a French work, containing an account of expired patents, published under the direction of the Government, had come into the Museum, in one volume of which the specification of the French invention was contained. That was two years before. I have no doubt that that book was in the *British Museum* catalogues. Of course I cannot say it was; but we know that, after two years, it would have been in the catalogue, and in fact long before; and there was nothing to shew that it was not read or used; and in the absence of evidence to the contrary, the presumption was the other way. We have the fact that there were several books introduced into *England*, and that there was one book in the Public Library of the *British Museum*. On those facts unexplained, it would have been a fair inference to have come to the conclusion that the invention of

Valdahon had been publicly known so as to be a part of the possession of the public as public knowledge.

The other case to which I was referred is the case of *Lang* v. *Gisborne* (1). There one *De Brettes* had published what the then Master of the Rolls held to be a description of the same invention. It was published in *Paris* in the latter part of December, 1857; that was more than two years before the patent, which was a patent of 1860. It was sent over to this country, and three copies were sold—one in the month of December, 1857, and that is more than two years prior—to Professor *Wheatstone*, a man acquainted with the subject of the patent. Then one, on the 6th of May following, was sent to the *Public University Library* at *Cambridge*, again more than two years before the patent; a third to Dr. *Richardson* at *Newcastle;* and a fourth to some gentleman in March, 1859, that is, more than a year before. So that all four books were sold previously to the provisional and complete specification of the Plaintiff's invention.

Besides, others had been sold by M. *Bailliere*, in *Regent Street*, and the book had been almost invariably in stock, and that for a period of upwards of two years before the patent. I should have had no hesitation in coming to the same conclusion as my predecessor, that under those circumstances there had been such a publication as to make it part of the public stock of knowledge, and that, therefore, the patent was bad. But it is said there is a *dictum* in that case which carries it rather further. I am not sure that it does, and I am by no means positive as to the meaning of the *dictum*. It is not of very much consequence, for Lord *Romilly* does not lay down a principle. He says: (2) "I am, however, of opinion that a publication takes place when the inventor of any new discovery, either by himself or by his agents, makes a written description of it, and prints it in a book, and sends it to a bookseller's to be published in this country. I am of opinion that it is not at all necessary to establish the fact that one volume of that book has been sold; for I think that as soon as an inventor informs the public of what his invention consists, and prints it in a book which he sends to a publisher to sell"—[That does not mean a single book, because it is plain, when he talks of a book published and

(1) 31 Beav. 133. (2) 31 Beav. 135.

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sold, that he means a large number of copies which are usually printed and sold. I do not understand him to mean a single volume]—"from the moment that the book is exposed for sale in the bookseller's shop, there becomes, in point of law, a complete publication of the invention."

Now, there is no law on the subject except this, that the Judge, on the facts proved, has to come to a certain conclusion. If it were necessary to express an opinion upon that, I should say it must depend on circumstances. It by no means follows, because the book has been printed and published, and sent to a bookseller for sale, that it is part of the public knowledge. Suppose it were proved that the bookseller never did sell any, or attempted to sell any. He says "exposed for sale." Suppose the bookseller had put one volume in his shop-window as exposed for sale for one day, and the next day, by direction of the author, destroyed all the volumes, that would not do, and I do not think that Lord *Romilly* intended that it would. These are general observations, not to be read in that strict literal sense, but in this sense: that, if a man publishes a book, that is a large number of copies, and sends them to booksellers for sale, and they are, for a reasonable time, exposed in the window, so that you may infer the people have known and seen them, and may reasonably so infer, though you do not prove one has been sold—if the other side cannot prove that one has not been sold, you may reasonably infer that some of those books have been sold. If he means anything more than that, I humbly dissent from it; and I say that my decision is supported by the previous decisions to which I have referred, because I am clear that, if it were shewn that no copy had ever got into the hands of the public, and the public knew no more about it than seeing the back of the book in the bookseller's window, and every copy could be accounted for, and that none had been sold though exposed for sale, that would not be a sufficient publication to avoid a subsequent patent. So much for the law on the subject.

What are the facts? It is stated that on account of the civil war in *America*, or some other reason, Mr. *Plimpton*, who had patented this invention in *America* in 1863, or some similar invention, for I have not got the patent, did not attempt to take out a patent in this country. But in that same year, 1863, the Com-

missioners of Patents in the *United States* published in the usual way a notice of the patents taken out in the *United States;* and their usual way—perhaps not the most convenient one, but the way they adopt—is simply to publish what are called "the claims." Now it is just as well to know what a claim is. Mr. *Hemming* mentioned an authority to the effect that really a claim in a patent is not a description of the thing patented, but it rather works as a limitation or, to some extent, one might almost say, as a disclaimer. It is very well explained in *Kay* v. *Marshall* (1). Lord *Cottenham,* in giving judgment in that case, says: "What follows is merely the claim, not intended to be any description of the means by which the invention is to be performed, but introduced for the security of the patentee, that he may not be supposed to claim more than what he can support as an invention. It is introduced lest in describing and ascertaining the nature of his invention, and by what means the same is to be performed (particularly in the case of a patent for an improvement), the patentee should have inadvertently described something which is not new, in order to render his description of the improvement intelligible. The claim is not intended to aid the description, but to ascertain the extent of what is claimed as new."

I take that definition from that great Judge to be correct. Still they published only the claim. I suspect the reason is that it is the shortest way of giving notice to the public that there is a patent relating to the subject-matter. That is all the public do know, and the public can then go the Patent Office and get a complete description. The meaning of these lists is to give notice that there is a patent relating to the matter. They know perfectly well what the meaning of a claim is, and it is not intended that the public shall from the copy of the claim be able to make the invention. However, these communications from the Commissioners of Patents in the *United States* are communicated to the English Commissioners of Patents, and are published in their journal, and they are also communicated to an American periodical or newspaper called the *Scientific American;* and the editor of the *Scientific American,* it appears, is very often in the habit of adding to the claims a short summary of what the invention consists,

(1) 2 Webs. P. R. 36, 39.

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according to his view. It is very short, and perhaps not always very accurate. It is not intended to fulfil the office of a specification, but its object is, as far as I understand, to explain a little further than he thinks the claim does what is the subject to which the invention relates; and in the case of this particular patent there was such an addition, comment, or summary by the editor in the *Scientific American*, which he distinguishes from the claims by putting it within brackets; and anybody acquainted with the *Scientific American*, or accustomed to read it, would know that that latter portion was something added—not furnished by the Commissioners of Patents, but added by the editor, or some other person who had control over that journal. In the particular instance, as I said before, that has been added, and, therefore, there was in the *Scientific American*, first, a copy of the claim to Mr. *Plimpton's* American patent, and, secondly, this comment or summary by the editor, or writer in the journal who undertook that part of the journal.

This was sent over to *England* a long time before 1865. A copy of it has been shewn to have been in the Patent Office Library for a considerable period, and to have been on the table in the public room of that library. That means this: The Patent Office Library is a library open to the public, and the books would be all placed in a room to which the public have access, which is a large room, but unfortunately the books have outgrown the space allotted. The public room has long been full, and books which arrive now, if they are of very great importance, are put into the public room, and others are withdrawn from the public room to make room for them. If they are not of great importance they are put into all sorts of little rooms off the public room, to which the public have no access; and though they are sometimes called for, and are in that sense in the public library, so that anybody who knows they are there can ask for them or obtain them, they are not practically, in the same sense, open to the public, as the books in the general library are, which anybody can get down from the shelves and look at. It is admitted in this case that nobody can make the *Newton* skates from this letterpress description in the *Scientific American*. About that there has been no contest.

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But there is a book published by a Mr. *Jewitt* in the *United States.* It was a private enterprise of a private American citizen, who took upon himself to publish some of the drawings attached to American specifications. Judging from the book, with which I was not personally acquainted till this case, he seems to have selected one drawing from each specification. He published this with the title, that it was a book containing the drawings referred to in the patents mentioned in the reports of the American Commissioners. So everybody who took the book knew what it was, and he distinguished the drawings by a number, which anybody acquainted with the book could see at once was the number of the patents. This book of Mr. *Jewitt's* being published from time to time, as the patents came out in the *United States,* contained a drawing which was obviously only one of several drawings attached to the patent of Mr. *Plimpton* which he had taken out in the *United States;* and the book so containing the drawings was apparently published and sold in the *United States,* but not published or sold in this country.

Mr. *Jewitt,* however, with that liberality for which I believe, as a general rule, American publishers are distinguished, sent to the Patent Office Museum, as a present, a single copy of the volume containing this drawing, and it arrived at the Patent Office Library on the 20th of July, 1865. That has been proved to my satisfaction.

When it arrived, the assistant librarian marked the date of its arrival in the book in pencil. He has been called, and has verified his mark; and he tells us that he took it first into the librarian's room, who ought in due course to have entered the book in the list of books in the library. It is not a catalogue, but a list of books. Two lists are made out. As soon as a book comes into the library by donation, it is entered in the list of donation books; and as soon as a book comes in by purchase, it is entered in the list of books purchased. But as soon as any book comes in, it ought to be entered in one or other of those lists. There is a reason for that, because the catalogue is only made up at long intervals of time, and it is a catalogue of something else than the mere titles of the books, and is a very troublesome thing to make. The officials at the office have quite enough to do, without con-

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tinually making up the catalogue; and therefore it is postponed, and they have a list of books, because the catalogue is not made up except at some considerable intervals of time. But unfortunately, or fortunately, I do not know which, for it depends on what view is taken of the result of this case, the book was not entered in the list of donation books in the library; nor was it entered, nor could it have been entered, in any other book, and it was not in the catalogue. Nobody who knows anything about the Patent Office knew of it. Then the book was taken, there being no room in the public room, to one of these small private rooms, it not being a book of sufficient importance to displace for it one of the books in the public room; and, for aught I see to the contrary, there the book remained untouched, and unread, and unlooked at till the year 1875. The inference I draw is, that that was really the case; and the reason I draw that inference is, this suit being instituted in the year 1875, a motion for an injunction was made before me to restrain this infringement; and on that occasion the Defendant who is himself a patentee of skates, and who is therefore very much interested in the matter, and who of course had employed patent agents, and legal advisers, and all that sort of thing, did defend himself on the ground of prior publication; and the only prior publication that he could produce at that time, that is, March 1875, was this copy of the *Scientific American*, and a copy of the *Commissioners' Journal*, which contained less than is contained in the *Scientific American*. Neither he nor his advisers, nor, as far as one can tell, anybody acquainted with skates, had ever heard of this book containing the drawing in question. It was discovered afterwards, though how or when exactly I do not know, but certainly some time before Christmas, 1875. My inference is, that it was not known to any one interested in these matters, still less to the public at large, till after March, 1875.

Now, I ask any one possessed of ordinary common sense, can it be considered to have been so communicated to the public as to become part of the common stock of public knowledge? Even assuming, as I do for this purpose assume, that an ordinary workman could have made the invented machine from a perusal of the letterpress, and upon looking at the drawing together, still we must recollect that there was nothing to tell anybody that there

was such a drawing in the library of the Patent Office at the date this patent was taken out, on the 25th of August, 1865. It was never entered in any book in that library; it was not on the public shelves accessible to the public; it was, as I have said before, in this private room; and we have the additional fact that even ten years afterwards, when these matters had become of such public interest that a great number of patents (I am told upwards of fifty) have been taken out, no one is shewn to have known of it, and there is a presumption that no one acquainted with this had then known of it because the defence of "publication" was taken in March, 1875. It does appear to me, sitting as a jury, that I should be wanting in common sense if I came to the conclusion that the existence of this book on the shelf in a private room in the Patent Library—private in the sense of not being accessible to the public, though public in the sense that if anybody had by accident known of it he could have sent for the book—would be such a publication as to deprive the man who first made it known to the world of that merit—the only merit so far as the importer is concerned,—which consists in making known a useful invention to the public. Therefore, on the question of novelty, I should give a verdict for the Plaintiff on this ground alone.

The second point is this: Assuming that the book was publicly known, or at least so far publicly known as to be known to all interested in these matters, the Defendant alleges, and the Plaintiff denies, that the letterpress and drawing together do contain that sufficient description which is necessary to enable a workman of ordinary skill to make the patented machine. As to that, again, one must consider what the law is. First of all, what is required as regards prior description? I should have thought, independently of authority, that no prior description ought to invalidate a patent, unless you could make the thing from the description. I mean unless a person of ordinary skill in the trade could make it from the description. But it has been alleged that something less will do. As I read the authorities, that is not so.

The question has been before the House of Lords in the case of *Neilson* v. *Betts* (1). The judgments of Lord *Westbury* and Lord

(1) Law Rep. 5 H. L. 1.

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Colonsay come to this—that the description in the book must be equivalent to a specification. I may say that this is entirely in accordance also with the case of *Hill* v. *Evans* (1), and the case of *Betts* v. *Menzies* (2); and even if I differed from them, which I do not, I should be bound by those decisions. On the other hand, there is a decision of *Betts* v. *Neilson* (3), which says that less will do: that the principle having been disclosed, although a workman could not make the machine (that is, the substance of it), that would be sufficient to avoid the patent. All I can say is, that I do not think that is fair to a patentee, and I should not have so decided had the matter been *res integra*: it is not *res integra*, and I have no right to depart from what has been laid down by the House of Lords and the Court of Appeal in the three other cases. Now, what is the meaning of it being a sufficient specification? Upon that there has been a very great deal of authority. Judges have stated it in different ways, no doubt, but I do not think there is much difference in substance.

In the first place, it is plain that the specification of a patent is not addressed to people who are ignorant of the subject-matter. It is addressed to people who know something about it. But then there are various kinds of people who know something about it. If it is a mechanical invention, as this is, you have first of all scientific mechanicians of the first class, eminent engineers; then you have scientific mechanicians of the second class, managers of great manufactories, great employers of labour, persons who have studied mechanics—not to the same extent as the first class, the scientific engineers, but still to a great extent—for the purpose of conducting manufactories of complicated and unusual machines, and who therefore must have made the subject a matter of very considerable study; and in this class I should include foremen, being men of superior intelligence, who like their masters would be capable of invention, and like the scientific engineers would be able to find out what was meant even from slight hints, and still more from imperfect descriptions, and would be able to supplement, so as to succeed even from a defective description, and even more than that, would be able to correct an

(1) 4 D. F. & J. 288, 300. (2) 10 H. L. C. 117.
(3) Law Rep. 3 Ch. 431.

erroneous description. That is what I would say of the two first classes, which I will call the scientific classes. The other class consists of the ordinary workman, using that amount of skill and intelligence which is fairly to be expected from him—not a careless man, but a careful man, though not possessing that great scientific knowledge or power of invention which would enable him by himself, unaided, to supplement a defective description, or correct an erroneous description. Now, as I understand, to be a good specification it must be intelligible to the third class I have mentioned, and that is the result of the law. It will be a bad specification if the first two classes only understand it, and if the third class do not. I do not think when the cases come to be examined, there is really any difference between the Judges on this point. Their language differs, but I do not think the cases differ. I will refer to the case of *Morgan* v. *Seaward* (1), where I think it is put by Mr. Baron *Alderson* as well as it is put anywhere, if I may say so: "It"—that means the specification—"ought to be framed so as not to call on a person to have recourse to more than those ordinary means of knowledge (not invention) which a workman of competent skill in his art and trade may be presumed to have. You may call upon him to exercise all the actual existing knowledge common to the trade, but you cannot call upon him to exercise anything more. You have no right to call upon him to tax his ingenuity or invention." Of course that is open to the observation that the meaning of the word "invention" may differ to different minds, and it is sometimes impossible to draw the line between perception and invention. We had an instance of that in the present case. One man may see from a drawing that which ninety-nine men out of a hundred cannot see. The witness Mr. *Hulse* stated he had a peculiar faculty for seeing from a drawing things other people did not see, and he likened it to the man who could read music at sight—could read a piece of music he had never seen before, as compared to the ordinary mortal who enjoys no such privilege. But again, as I said before, some people might have said that what he thinks is perception is invention. In fact, he describes it as intuitive perception, a peculiar power. Many people would call that the

(1) 1 Webs. P. R. 174.

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power of supplementing by invention what the drawing disclosed to ordinary persons. It is quite impossible to say, without considering the concrete, that is, without looking at the subject-matter in respect of which you have to decide—it is quite impossible to say, in the abstract, what is invention and what is perception. It is therefore, I think, to be decided by the jury, under the direction of the Judge; or if there is no jury, by the Judge alone, what, having regard to the subject-matter, is an exercise of invention or an exercise of perception. So much for the law. Again, I may say, and this bears on another branch of the subject, that that is important as to another objection, which I should like to dispose of at once, namely, what the specification ought to tell. First of all it ought to tell the workman how to do it; but it need not tell him every detail. Mr. Baron *Alderson* (1) says this: "Now, a workman of ordinary skill, when called to put two things together, so that they should move, would, of course, by the ordinary knowledge and skill he possesses, make them of sufficient size to move. There he would have to bring to his assistance his knowledge that the size of the parts is material to the working of the machine. That is within the ordinary knowledge of every workman. He says, 'I see this will not work because it is too small,' and then he makes it a little larger, and finds it will work: what is required is that the specification should be such as to enable a workman of ordinary skill to make the machine; with respect to that, therefore, I do not apprehend you will feel much difficulty." Therefore he does not mean that the man is to shut his eyes, and copy what he sees before him; but he is to do it in an intelligent manner, and when he has made it according to the specification, and sees it will not work, and sees by the ordinary knowledge of his trade what is to be done to make it work, he is to make it work; and if the specification does not mislead, and contains enough to enable the man to do that, then it is sufficient. The other cases upon the subject are numerous. It is sufficient to say that, in my opinion, they do not conflict with what Mr. Baron *Alderson* lays down in *Morgan* v. *Seaward* (2).

I have now to decide upon very conflicting evidence, whether

(1) 1 Webs. P. R. 176. (2) 1 Webs. P. R. 174.

or no the workman I have described could have made this machine from the combination of the letterpress in the *Scientific American* and the drawing. First of all, let us consider again what the workman would know. He would know that this was a a copy of two claims. I have already shewn, from the luminous exposition of Lord *Cottenham*, that a claim is not a description of an invention, but a thing put in for a very different purpose. He would know also, when he looked at the letterpress and the drawing, that the drawing referred to in the letterpress was not the drawing he had to deal with, because he would find there were letters in the letterpress not to be found in the drawing, and at least one letter in the drawing not to be found in the letterpress. He would therefore come to the conclusion that, though he had before him a drawing belonging or referred to in the American specification, he had not the drawing to which the letterpress referred. He would then find a note of the editor of the newspaper, and if he was acquainted with the *Scientific American*, he would know that the note, according to his practice, attempted to give the substance of the specification as distinguished from the claim. It does appear to me that, with that knowledge before him, he would attach more importance probably to the note which was to describe the substance of the specification than he would to the drawing. He would also know that it was not intended from the letterpress alone to enable him to make the machine, and therefore he would have to find out from a thing not intended for a specification or description what it was. The meaning of that observation is this: When you put a specification in a workman's hands, he is told there is something that can be made from it, which will be useful; but when you put into his hands a mere notice to the world that there is such a patent, he is told that nothing can be made from it, for the meaning of the notice is not to enable him to make it, but to tell him where to find instructions to make it. He comes to that with a different view, and he finds a drawing, not the drawing in the specification. I think most ordinary workmen would not try to make it out, and that it would be a very extraordinary workman who would attempt it.

But suppose he did try, what would he find next? Here I come to the difficulty to which I have adverted more than once in the

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course of the argument, that having acquired during the course of this long discussion a very considerable knowledge as to the nature of and the mode of working this invention, I have to put my mind in the state in which this workman's mind ought to have been in the year 1865, when nothing at all was known about the subject-matter, either of the mechanical arrangement to which I have referred, or of roller skates at all, as distinguished from common parlour skates, which were, I believe, known. I must consider that the workman, though a skate maker, would really, from his knowledge of ordinary common skates, know very little about it. That is, that there was no trade knowledge to work upon.

In addition to that, I find this in the *Scientific American*, that there are several words used the meaning of which was not known to me before this case, and, as I gather from the evidence, not known to anyone in *England*. Whether they are in fact American terms known in *America*, or whether, as regards one or more of them, they have been used by this inventor in a new sense—a sense sufficiently explained by his drawing and context; or whether he himself did not use them for the first time, I know not—I have no evidence before me. It may be that he first used them in this sense, or it may be it was a sense known in the *United States* at the time to mechanicians. That I have no evidence of, and I have no knowledge of my own to supply that evidence. Thus the workman would have found in the letter-press several words not known to him, having no trade meaning, and which would convey no meaning to his mind. He would first find the word "runners." That word "runners" gives me, from the evidence, no meaning at all in 1865. What a runner was, as belonging to a skate, I take from the evidence, nobody knew in 1865. It was an entirely new term in *England*, whatever it may have been in *America*.. He would then find that something was to be "turned," "cramped," or "adjusted." Now, whether the verb to "cramp" was part of the American Dictionary, in that sense, in the year 1865, I know not, but it was not part of the English Dictionary in that sense. It had no mechanical meaning, and upon that there has been no conflict of testimony. Then he would find another thing. He would find the word "cant," which

is put in with "turning." As to the word "cant," there has been a great deal of question; but the conclusion I have come to is, that what was said by one of the witnesses for the Defendant is correct, that it is a word of wide meaning; that it was not confined to one particular motion in the lateral direction, as distinguished from a motion in the upward or diagonal direction; that it was a term of wide meaning, not a term of definite use in mechanics; not a term in common use at all, but a rare and uncommon term, and one the meaning of which no ordinary workman would, by any reasonable attribution of knowledge, be supposed to be acquainted with. As to that there is some doubt, for there is a great conflict upon the evidence.

Then, in addition to that, he would find this; and now he would come to something which perhaps he thought he could understand. He would find in the editor's note that which comes to a short account of the specification, which I say would be more a guide than the claim. He would find that it was an improvement in the attaching of rollers, &c., "whereby the former are made to turn or cramp like the wheels of a waggon"—(As I said before, he would not know what "cramp" meant at all)—"and facilitate the turning of the skate, there being two pairs of rollers to each skate." I think myself, and I have the evidence in my mind when I say so, that he would infer from those words, "like the wheels of a waggon," that they would turn round a vertical axis. Upon that the evidence stands in this way. We have the evidence of Mr. *Bramwell* and Mr. *Imray*, two eminent mechanical engineers, who say that they would have so understood it. Of course this is mere matter of opinion. Those gentlemen must be in the same difficulty that I am in myself, because when they gave the opinion they knew all about it, and they have to consider to what conclusion they would have come if they had not known all about it; and it is a very difficult mental process to say what you would have thought of a description, the meaning of which you know, if you had not known the meaning. But that is their opinion. On the other hand, three experts say—and on these matters I do not count whether they are two or three, although I should be very glad if there was a rule that in patent cases neither side should call more than two experts—three experts say it does not convey

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to their mind any such notion. They do not know much about "cramp" either, but they think the words "made to turn like the wheels of a waggon" do not refer to the mode by which they are made to turn—that is, the mechanism of the turning, but refer to a description of the motion; that is, that they are to move in a similar direction, or with a similar motion, but not that the mechanism is similar. Both sides have seen the drawing, and both sides tell you that in 1865 they would have arrived therefore at opposite conclusions. If I am to look at it grammatically, I think the grammar is rather more in favour of the Plaintiff's experts than the Defendant's experts. It is not that the former will "turn like the wheels of a waggon," which I should have thought would have been the natural expression if you were describing the motion, but that they are made to turn. I do not rely much on that, because I cannot say it is clear from the grammar either way. It is ambiguous, it is capable of both interpretations, and therefore you have these gentlemen, with an ambiguous form of words before them, arriving at the conclusion, that if they did not know what they know now, they would have arrived at the conclusion which happens to be most favourable to the side on which they have been called. I do not mean to reflect on these gentlemen, but there is on these mere matters of opinion a certain amount of bias in the minds of the experts towards the side on which they are called. It does so happen in this case, as generally happens in these matters of mere opinion, that the experts on one side are in favour of their side, and the experts on the other in favour of their side.

Now I have got something in this case to assist me which we do not generally get. The intelligent workman was produced, and I was very anxious to see what he did and what he thought of it. And when I say the "intelligent workman," I really mean that, for he was a very intelligent workman. I am by no means prepared to say that he is an ordinarily intelligent workman. I wish I could say so. I should be delighted to be able to say that the average of our ordinary skilled workmen were at all equal to Mr. *Edwards*. He is a very intelligent man, and, indeed, I shall have to make an observation upon that which I may as well make at once—that I think he was picked out for his intelligence; and the reason I say so is this:

Somebody on the Defendant's side went to a Mr. *Pomeroy*, the manager of Messrs. *Holtzapfel & Co.*, who have been described as the makers of complicated machines—principally lathes and so on —and certainly told him something. What he told him I do not know. He must have told him, in some shape or other, that he wanted a skate made according to the letterpress in the *Scientific American* and the drawing. Whether he told Mr. *Pomeroy* exactly what it was wanted for or not I cannot tell. Most likely Mr. *Pomeroy* would ask what it was wanted for, and would ask something about it; but as to that I do not know. When Mr. *Pomeroy* got the sketch of the drawing, he sent for a workman to make it. What sort of a workman would he send for? It was not a very easy thing to make; that anybody can see. He had got before him a manifestly imperfect description, for the reasons I have given. He therefore would not send for the most stupid of his workmen, and I think he would send for the most intelligent of his workmen, the man who would be most likely to make it from the drawing. I think, therefore, independently of what I have seen of Mr. *Edwards*, that he was a most uncommonly intelligent man, and that he was selected for his intelligence by the manager of Messrs. *Holtzapfel's* works. But that is mere inference. What does this intelligent workman do? He is asked to look at the description. What did he think it meant? He says he read, "Whereby the former are made to turn like the wheels of a waggon," to mean exactly what Mr. *Bramwell* and Mr. *Imray* said he ought to take them to mean, and he said he found out it would not do, so he left it out. His words were: "I departed entirely from the instructions as to making the wheels turn like the wheels of a waggon. It occurred to me that the direction to make the wheels turn like the wheels of a waggon was not correct, and I applied my intelligence to devise something else, and I did by my own intelligence devise another plan without departing from the drawing." So that this intelligent workman, reading it for the first time, came to the conclusion that what was an abstract, or a condensed statement, of the specification was wrong, and looking at the drawing he had sufficient intelligence, as he describes it, but, as I should describe it, sufficient inventive power, to correct the mistake.

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If I understand the rules of patent law, you must not mislead people by telling them to do something wrong, and leaving them to find out the mistake. Therefore, if this were really the meaning of the letterpress—which, upon the whole, I think it is, though I say I am in great difficulty about it, but I am confirmed in my view by what the workman did—then I think it is clearly insufficient, because it tells you to do something which cannot be done to make the thing useful, though he did, by his own intelligence, in looking at the drawing, find out what was required. You must not give people mechanical problems and call them specifications. You may set to a dozen engineers a mechanical problem, and perhaps eleven out of the twelve will find it out; you may set to a dozen selected workmen a mechanical problem, and perhaps, of that dozen, three-fourths will find it out; but that is not the meaning of a sufficient specification to make a patent article, and, therefore, having had the intelligent workman before me—and a very intelligent workman he was—seeing how he read it, I think that the reading proposed by Mr. *Bramwell* and Mr. *Imray* is the more likely reading to have been adopted by the ordinary intelligent workman, than the reading proposed by Messrs. *Cowper*, *May*, and *Hulse*. But it is said Mr. *Bramwell* ought to have found it out, and I must say that the cross-examination of Mr. *Bramwell* on one portion of his evidence was effective. I think Mr. *Hemming* shewed Mr. *Bramwell* that he had made a mistake as to the mode of turning, which he thought was not possible. But I will assume that he ought to have found it out, and I will assume that Mr. *Imray* ought to have found it out, as well as Messrs. *Cowper*, *May*, and *Hulse*. What then? That is not the class to which these things are addressed. Supposing these great mechanical engineers had found it out, it would only shew they had sufficient capacity to solve this mechanical problem, and nothing more.

There was another witness called, and I am sorry he was called, because the letterpress and drawing were given to him in the middle of the trial. Somebody took the letterpress and drawing to Mr. *Botten*, who was not an ordinary workman. He had been a workman at one time of his life, but he was one of that superior class who rise to masters. I wish there were more in this country than there are; but anybody who knows anything about

our working men will know that the class who rise from workmen to masters are a very superior class. Now he, having the drawing and the letterpress, certainly made a machine, but he made it, as the other workman did, eventually without the buffer. I will go back for a moment to what *Edwards* did. *Edwards*, from the drawing in the first instance, did not make it quite right. He did something very ingenious, and which, to a certain extent, would have answered the purpose. Instead of making a diagonal axis of metal right through the triangular piece, he pinned it at both ends. He found it would not work, and in order to make it work, he made his pins move—that is, free at both ends—and then it worked. And after that, how long after he did not recollect, but sometime after—he found out the actual and best mode of doing it, namely, by putting his pin right through. That is what he did, but he never found out the subordinate part of the invention—that is what I have called the buffer or moderating spring. That he never found out at all. And as to that he says, fairly enough, "I left it out because I did not understand what it was, and there was no description of it in the letterpress." He made the best machine he could, but he did not understand the drawing any more than the letterpress. He misunderstood both, and made it so far wrong that he left out that which was certainly not an essential portion of the invention, in the sense that the invention would have been a good workable invention without it, and in the sense that in my opinion anybody who made the skate without the buffer would be infringing. Still he did make it without the buffer. The second man, Mr. *Botten*, also made it without the buffer. He could not make it out, and he made it, in the first instance, not according to the drawing. He added an invention of his own, and not an immaterial invention. He was not only a man who, I think, was capable of inventing, belonging to the superior class of workmen, from whom he had emerged, but he actually did invent and put into that first model things not found in the drawing at all. Then he was asked to make a larger one. On this point I have already remarked, and I do not wish to say anything at all unpleasant to Mr. *Botten*. There was a little exaggeration and a little forgetfulness; but I think he was stating what he believed to be true.

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Being asked to make his first model larger, he improved it and made it much better, and his second model is a much better model than the first. He altered some parts, and he improved other parts by making the wheels lock on the foot-stand; and he not merely copied his own model, but he improved it. So much for the actual operation. Now, taking all this together, can I say that this was such a description as satisfies the exigencies of the law, that it was a fair specification from which an ordinary workman could make the machine? I think I cannot. And on this point also my verdict on the issue will be in favour of the Plaintiff, though, for the reasons I have specified, it was not actually necessary to decide it.

I now come to the next issue—the sufficiency of the specification. On this part of the case two objections were taken. It was first of all said, that the specification was ambiguous—that is, ambiguous in the sense that a person of ordinary common sense acquainted with the subject-matter would not understand it. That has been the definition of ambiguous, given as regards specifications. What is this specification? I am at a loss to see the ambiguity. I have heard the argument, but, with one exception, I never saw a better specification; and as regards the roller skate itself (I am not now speaking of the runner skate), anything more complete in the shape of description, or in the shape of directions, I think I have never seen at all. Upon that the opinion of Plaintiff's experts was not contradicted by the opinion of the Defendant's experts. There was not a single person produced before me who said he did not understand it; and nobody alleged there was this ambiguity, except Mr. *Hulse*. He may have found an ambiguity which did not occur to anybody else. The ambiguity, as far as I understood him, was this—that he said he could not tell whether there was one invention claimed, or four inventions claimed, by the first claim. It only applies to the first claim: "Applying rollers or runners to the stock or footstand of a skate is described, so that the rollers or runners may be cramped or turned, so as to cause the skate to run in a curved line, either to the right or left, by the turning, canting, or tilting laterally of the stock or foot-stand." What does that mean? It simply is this: "I made a machine which I have described, and now I will tell you what I

consider new. I consider new the making of skate-runners, or the wheels of skates, or the rollers of skates, or the runners of the skates, to go in a curved line, as I have described, from lateral motion; that is, I have shewn you the mode of actuating your wheel, and I have shewn you also a regulator, or moderator, or buffer, which will regulate the action produced. This is what I claim." To me it is as plain as plain can be. I see no ambiguity on this point. I think it is unnecessary to dilate further on it.

The second point, on the insufficiency of the specification, was a very singular one. It was a very small point, and a point that, as far as I can see, was only recently discovered. It is obvious it was not discovered very long, because it was not taken by the answer.

It was only by a special order that I allowed the Defendant to supply an omission in his answer as to utility, which would have embarrassed him very much in arguing this point. The second claim has nothing to do with the roller skate at all; but it refers to the mode of securing the runners, and making them reversible, as above described. Now the allegation of the Defendant is this, that when you have hard ice, and the surrounding atmosphere below freezing-point, and you want to skate with these runner skates, your runner must be inclined, so that one edge of the runner shall bite the ice; and it is obvious to any one, when you consider what the skate is, that that must be so. Mr. *Plimpton*, in cross-examination, admitted it. You can, for soft ice, no doubt, put your runners vertically; and then you can skate, because the foot, by pressure, gets the runners into the ice. But when it is hard ice, well frozen, your runner must be put obliquely, so that it shall present an edge to the ice. And it is said that the specification is bad, first of all, for not telling the reader that the runners are to be placed obliquely; and, secondly, for not telling him the degree of obliquity. Now, it is said the evidence shews that to make a good useful skate you must have a considerable amount of obliquity. I do not mean to say you cannot use it without, but that the best form of skate known would have at least twenty degrees of obliquity—that is, the runner would be sloped to the extent of making the angle of twenty degrees to the vertical line.

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The law on the subject is perfectly well settled. A specification is bad if the patentee has described something which will be useless as an integral part of his invention; and a specification is also bad if the patentee, at the time he takes out his patent, knows of a more convenient and better form of performing the operation and conceals it from the public, and puts into his specification a less convenient and worse form. Thus, if it were a chemical patent—if, at the time of taking out the patent, he knew of cheap ingredients which would make the patented article, and also knew of dear ones, if he suppressed the cheap ones, and only named the dear ones, that would invalidate the patent.

In this case it was not denied, notwithstanding the opinion of some of the experts, yet, looking at the opinions of other experts, and the cross-examination as to the working of the specification, it was not denied by Mr. *Hemming*, in his argument, that a reasonable man trying to understand this specification would find out that the four angular edges were to be successively used and successively presented to the ice, whether they were presented obliquely——

[*Hemming*:—Would your Lordship allow me to say, that I considered there was an ambiguity? I said that many would find it out, and then I argued it on the assumption that the construction was taken against us. I did not wish to abandon the point.]

I will assume that the point has not been abandoned. I thought it had, but it does not matter. It was argued on the assumption that it was not worth presenting to me in a detailed way. I think it is beyond argument. It is quite true that Mr. *Bramwell* said something that looked the other way, and it is quite true that Mr. *Cowper*, and I think also Mr. *May*, said the same, though on cross-examination they found something was different. Mr. *Cowper* on cross-examination, on being asked what meaning he gave to the specification between lines 20, was obliged to say he thought the patentee had made a mistake. Mr. *Bramwell* said something of the same kind. On the other hand, we had the inventor himself, who intended to make it clear, who certainly knew they would be oblique on hard ice, and he said he thought he had so described it; I mean Mr. *Newton*. Mr. *Imray* not only said he thought it quite clear, but pointed out why; and Mr. *Hulse*, the other expert

called for the Defendant, not only understood it so himself, but said he thought that, though some workmen would make a mistake—and probably most workmen would make a mistake in the first instance—yet the workman would immediately see it was wrong, and put it right; and he said that if there were people from whom they could get instructions, they would apply; and yet, if there were nobody to instruct them, they would find it out without. Taken, therefore, upon the bare balance of the evidence, and not to be regarded on mere trumpery grounds, or on little bits of fringe —taken on the balance of evidence, the ordinary workman ought to have found it out.

But, after all, it is for me to decide this. Let us see how it stands. There is, first, the drawing of the bottom of the skate—the only thing which shews the runners. There is no end-view of the runners, and it was very fairly stated by Mr. *Hulse*, that a man who saw the bottom drawing would not expect to find out from that whether it was inclined or not. It is a very small thing. It would be very difficult to shew it. I do not say impossible, because it might be done by a second or third line; but he said no workman would expect to find it out from that, and that if you want to give him a proper view, you must give him an end-view. The question then is, What ought you to find out from the letterpress? I have no hesitation in saying you ought to find out it was oblique, and was to have a smooth running surface, with angular edges, so that they may be reversed when the inner edges lose their angularity. But what is the meaning of "inner edges"? It is a square thing, and the inner edges must mean the inner edges as regards the ice: "Both edges of one surface have worn, and the runner may be inserted, and two more angular or sharp edges obtained. Then each runner has four angular edges, which may be successively used before the runner will require to be sharpened." Of course, if they are to be successively used, it means they are to be presented successively to the ice, and one is to be used at a time. I myself have no doubt and no hesitation in saying, it being my province to decide, that this does tell any reasonable person, who wants to know what the invention means, that there are four edges successively used, that the runner is to be placed obliquely on the holder, in order to carry out the invention.

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Having got to that, let us consider what the two next objections are. The first objection is an objection—utility. It is said that in order to make the best form of skate, you must have an inclination to the vertical of at least twenty degrees, that it will not be a good skate without you do, though a skilful person might use it—it will not be a good skate. But, as regards utility, the law is very clear, that a small amount of utility will do. There are so many authorities on the subject that I am almost ashamed to mention them, but nothing can be better settled. I will refer, without reading them, to *Neilson* v. *Harford* (1), and *The Househill Coal and Iron Company* v. *Neilson* (2), I might refer to a couple of dozen cases, if necessary, as to utility, and they all shew what a very small amount will do. Now it cannot be denied that there is some amount of utility even in the straight skate. If it is quite vertical, it may do for soft ice; but when you find it to be oblique, we have the evidence of the inventor that he skated from zero up to forty-five degrees of inclination. That you could skate at a very small inclination, though I admit not as well as you could at a greater inclination, I think is indubitable; and therefore on that question of utility I am in favour of the Plaintiff.

The next objection was this, and it is an objection, as I have said, well-founded in law, if it is made out: the patentee is bound not only to tell the public enough to make the invention useful, but to shew the most convenient form of performing it within his knowledge. It was said that Mr. *Plimpton* knew from practice, that he skated himself, and had seen his daughters and other ladies skate, and that he knew that the skate commonly used was a skate with runners at an angle of twenty degrees to the vertical, and therefore he should have told the public in his specification that the angle should be twenty degrees at least, and that not having told them so the patent is bad. Now the first answer to that is very obvious. Mr. *Plimpton* is not the patentee at all; Mr. *Newton* is the patentee. And what the law requires is, that the patentee shall tell the public what he knows. Now, not only is there no suggestion that Mr. *Newton* knew this, but, as he told us in the box, all he knew about it was the instructions he received from *America*, which he produced. He said, I am only the patent agent, and there is not a pre-

(1) 1 Webs. P. R. 295. (2) 1 Webs. P. R. 675.

tence for saying that he had ever skated with these skates, or knew that they wanted twenty degrees or any number of degrees to the vertical; therefore, the objection in law fails altogether. But even as regards Mr. *Plimpton*, I do not think it is sufficiently proved. What you have to prove is knowledge at the time. That he knows it now is certain. He has taken out, as I understand, another patent, namely, in 1874, and then only his attention was directed to this point, but it was not got out that on or before the 25th of August, 1865, he knew this. The question is, the state of his knowledge at the time this patent was taken out in 1865; and as I read the evidence, it is not distinctly shewn, or sufficiently shewn, for me to invalidate the patent, even if it had been granted to Mr. *Plimpton*, that he knew this on the 25th of August, 1865. On all these grounds, I think that upon the question of sufficiency of specification, my verdict must also be in favour of the Plaintiff. The other issues having been found in favour of the Plaintiff, there is nothing more to be said than that I find a verdict for the Plaintiff on all the issues.

It was arranged that the decree should be suspended in case the Defendant should decide on an appeal.

March 2. *Matthews*, Q.C., now moved that the decree might be drawn up.

JESSEL, M.R.:—

Let it be drawn up forthwith.

Solicitor for Plaintiff: *W. Clarke*, agent for *Clarke & Howlett, Brighton.*

Solicitors for Defendant: *Tilleard, Godden, & Holme*, agents for *Black, Freeman, & Gell, Brighton.*

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1876
March 12.

HIRSCH *v.* JONAS.

[1876 H. 102.]

Trade-mark—Injunction.

The Plaintiff, a cigar merchant in *London*, registered a label at *Stationers' Hall*, which he requested *G.*, the manufacturer at *Havannah* who supplied him with cigars of a particular description, to affix to each box consigned to him. *G.* accordingly affixed the label, with his own name as manufacturer, to all boxes so consigned. The Plaintiff subsequently discovered that *G.* was supplying cigars of the same description, and with the same label, to the Defendants, who were *G.'s* agents, and brought his action to restrain the alleged infringement of his trade-mark. On a motion for an injunction against the Defendants:—

Held, that, there being no evidence of any contract that *G.* should supply the Plaintiff exclusively with that description of cigars, the Court could not, on an interlocutory application, restrain the Defendants from using the label.

Statement.

THIS was a motion for an interim injunction to restrain an alleged infringement of the Plaintiff's trade-mark.

The Plaintiff was a cigar merchant in *London*, who purchased cigars of a particular description from *Joseph Genir*, a manufacturer at *Havannah*, who had supplied him since 1869. In that year the Plaintiff adopted a label with a device representing *Britannia*, and the inscription, "*Gloria de Inglaterra*," which he registered at *Stationers' Hall* as his own copyright. The Plaintiff then wrote to *Genir* to the effect that he had secured this device as his own exclusively, so that no one else could use it, and requesting *Genir* to affix a label with this device to each box of cigars which he supplied to him, and accordingly *Genir* afterwards used it on all boxes consigned to the Plaintiff, adding the words (in Spanish) "of *Joseph Genir*, Manufacturer of Cigars, of *Havannah*."

It appeared that for some years *Genir* only supplied cigars of this description to the Plaintiff, but the Plaintiff, having recently discovered that *Genir* was supplying the Defendants, who were his agents, with boxes of similar cigars, with the brand "*Gloria de Inglaterra*," brought an action to restrain them from selling any boxes of cigars having the label affixed, which he claimed as his exclusive trade-mark.

It did not appear that there was any contract between the Plaintiff and *Genir* that that description of cigars should be supplied to the Plaintiff exclusively.

Chitty, Q.C., and *T. L. Wilkinson*, for the Plaintiff, in support of the motion.

E. Cutler, for the Defendants, was not called on.

JESSEL, M.R. :—

Judgment.

This is not a case in which I shall interfere by interlocutory injunction. It is a case of great singularity. It is the first case of the kind in which a serious attempt has been made to obtain an injunction at this stage of the cause in my Court.

The case stated is this: A merchant in *London* of the name of *Hirsch* sells cigars like any other merchant. He has a correspondent in *Havannah* named *Genir*, who is a maker or manufacturer of cigars. *Hirsch* is in the habit of buying cigars of him. That is the only connection between them. In the year 1869, *Hirsch* employed an artist to make a drawing of a lady with a trident and a lion and a ship, and to put on the drawing "*Gloria de Inglaterra.*" He then wrote to *Havannah* asking *Genir* to adopt this design as a label for the cigars to be consigned to him, and also stating that he had secured it in some mysterious manner in *England*, so that no one else could use it. He had, in fact, registered it at *Stationers' Hall*. Thereupon the manufacturer at the *Havannah* puts this picture on the boxes of cigars in this way: He puts the description "*Gloria de Inglaterra*" on the top of the box, and then puts the picture itself at the side, putting on again at the side the "*Gloria de Inglaterra*" of *Joseph Genir*. He has put his own name on the top, and on the side he puts "*Gloria de Inglaterra* of *Joseph Genir*, Manufacturer of Cigars, of *Havannah*." That is all the public can see. Therefore, in both labels he claims the cigars as belonging to *J. Genir, Havannah*. Then when you open the box you find simply the design with the name of the manufacturer. The only representation on the box, as it appears to me, is that the cigars are *Genir's* manufacture.

Mr. *Hirsch* says that *Genir* wrote to him a letter to say that

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some one else had asked him to supply cigars with this design, and that he had declined to do so. But there is no contract that *Genir* will not supply cigars under this label to any one else. If there is such a contract, it must be alleged and proved. I cannot find on the part of the Plaintiff any evidence of any contract with *Genir* to supply him with goods of that description.

As I understand, the Plaintiff simply buys cigars of Mr. *Genir* when Mr. *Genir* chooses to sell them. But, as I understand, there is no contract to secure the Plaintiff another box of cigars if Mr. *Genir* chooses not to supply them. I can find nothing to shew that he will be injured. He does not tell me he has got any stock of these cigars in hand. If I do not restrain the Defendants, who are but the agents of *Genir* in *England*, I do not see how it will injure the Plaintiff at all. He can get no more cigars, and if he has no stock at all I do not see how he will be injured.

Now the defence is this: "It is our trade-mark. No doubt it was suggested by the Plaintiff, but it is ours. We have always used it as ours: we are the agents of *Genir*. *Genir's* cigars are genuine cigars of the quality in question. The public will not be deceived, nor will the Plaintiff be injured."

On what principle am I to restrain the Defendants at this stage of the action I am utterly at a loss to find out. As for the question of trade-mark, the trade-mark of manufactured goods means, I suppose, that the goods are manufactured by the person whose trade-mark it purports to be. In this case the manufacturer is *Genir*. I can understand a man saying, "I am not the actual manufacturer of goods, but the selector of goods, and my reputation for cleverness and selection is so great, that goods marked with a mark to shew that they had been selected and approved of by me will fetch a higher price in the market." If *Hirsch* had put on the box "*Gloria de Inglaterra Havannah* Cigars, selected by *Hirsch*," he might have had a case to prevent other people imitating that. It would shew that the cigars selected were approved of by him. If he got a great reputation in that way, I can understand he would have a right of protection for that which indicates to the public that the cigars were selected and approved of by him. That is not his case. There is nothing on the boxes to shew anything about *Hirsch* at all. All he says is

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that the trade knows this mark as denoting cigars sold by him, which I dare say it does. It appears to me at present that he has no case whatever, and there is no use my granting an injunction. I do not know whether he may make out a contract hereafter.

In refusing the motion, I shall make the costs costs in the cause.

Solicitors for Plaintiff: *Allin & Greenop.*
Solicitors for Defendants: *Lumley & Lumley.*

MAYD *v.* FIELD.

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1876
March 31.

[1873 M. 73.]

Married Woman—Separate Estate—Liability for General Engagements—Appointment by Will—Cumulative or Substitutional—Satisfaction.

Personal property settled on the marriage of *C. W.* in trust as she should during coverture by deed or will appoint, and, subject thereto, for her separate use for life, and if she survived her husband (which happened) for her absolutely:—

Held, to be bound by her general engagements.

Accordingly, *C. W.* having in a settlement on the marriage of her daughter *L.* covenanted with the trustees thereof for the payment to them on her decease of £1000 to be in trust for *L.* for life, then for the husband of *L.* for life, then upon the usual trusts for her children:—

Held, that the trustees of *L.*'s settlement were entitled, on the death of *C. W.*, to stand in the position of creditors in respect of the property comprised in the first settlement.

By the will of *C. W.* executed under the power of the first settlement, £1000 was settled upon trusts similar to those of Plaintiff's settlement, omitting the husband's life interest:—

Held, that this was a case of satisfaction, and that neither *L.* nor her children took anything additional under the will unless *L.*'s husband survived her:

Held, also, that dividends received by *C. W.* after her husband's death, and railway stock representing part of her settled property which was realized after her husband's death, did not pass under her testamentary appointment.

Statement.

BY an indenture dated the 20th of August, 1856 (being a settlement made on the marriage of *Edmund White* and *Caroline White*), certain personal property, furniture, and effects, to which *Caroline White* was entitled, were assigned to trustees upon trust to assign

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and dispose of the same to such person or persons, and in such manner, as *Caroline White* should during her coverture by deed or will appoint, and, subject thereto, upon trust during the joint lives of *Caroline White* and *Edmund White* to pay the income of the trust funds as *Caroline White* should appoint, and subject thereto to *Caroline White* for her separate use, and after the decease of either of them, in case *Caroline White* should survive *Edmund White* (which event happened), in trust for her, her executors, administrators, and assigns.

By an indenture dated the 3rd of August, 1858 (being a settlement on the marriage of the Plaintiff, a daughter of *Caroline White*, by a former marriage, and *William Mayd*), *Caroline White* covenanted with the trustees of her daughter's settlement that the heirs, executors, or administrators of her the said *Caroline White* should within six calendar months after her decease pay to the trustees or trustee for the time being of that settlement the sum of £1000 with interest as therein mentioned, and that the said trustees should stand possessed of the said sum upon trust for the Plaintiff for her separate use during her life without power of anticipation, and, after her decease, for *W. Mayd* during his life, and after the decease of the survivor, in trust for the children of the marriage, as *W. Mayd* and the Plaintiff should jointly appoint, and in default of such appointment, as the survivor should by deed or will appoint, and in default of appointment, for the children equally, as therein mentioned.

Caroline White was not described in the last-mentioned settlement as a married woman, nor did the settlement contain any reference to her own marriage settlement, nor to the property thereby settled or the power of appointment thereby given.

Caroline White, by her will, dated the 30th of December, 1864, which was expressed to be made in exercise of the power given by the settlement of the 20th of August, 1856, gave the residue of her real and personal estate to her executors upon trust as to £1000, part thereof, upon the same trusts as were thereinafter mentioned in respect of the one moiety of her residuary estate given in favour of her daughter, the Plaintiff, and as to the rest and residue of her said real and personal estate upon trust to pay the dividends in equal moieties to her daughters, *Emma Green* and

the Plaintiff, for their separate use; and after the decease of either of them, the testatrix bequeathed the moiety of her estate to such of the children of such daughter as she should by deed or will appoint, and in default of appointment, to the children equally, as in the said will mentioned.

Edmund White died in 1871; *Caroline White* died in 1873.

Statement.

The bill was filed by the Plaintiff, *Lucy Mayd*, by her next friend, against the trustees of the two settlements, the surviving executor of the will of *Caroline White*, the said *William Mayd* and others, as Defendants, for obtaining the direction of the Court as to the trusts of the will of *Caroline White*, and of the settlement of the 20th of August, 1856, so far as the will operated in exercise of the power of appointment by will by the said settlement given to *Caroline White*.

The principal questions were, whether the property comprised in the settlement of the 20th of August, 1856, was, in the events which had happened, the separate property in equity of *Caroline White*, so as to be bound by her general engagements, and, if so, whether the £1000 bequeathed by the said will in trust as therein mentioned for the benefit of the Plaintiff amounted to a satisfaction of the covenant on the part of *Caroline White* to pay to the trustees of the settlement of the 3rd of August, 1858, the sum of £1000.

There was a further question, whether dividends which *Caroline White* had received after her husband's death, and certain railway stock which she had purchased, representing the proceeds of some of the furniture comprised in the settlement of the 20th of August, 1856, which had been sold after her husband's death, passed under her will or were undisposed of.

Argument.

Chitty, Q.C., and *Caldecott*, for the Plaintiff:—

Assuming that the covenant contained in the settlement on the Plaintiff's marriage did not operate as an execution of the power reserved to Mrs. *White* by the settlement on her own marriage, since it referred neither to the power nor to the property comprised in her settlement, still it operated as a general engagement on her part, binding the property subject to the trusts of her settlement, which was in effect her separate property by reason of

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the power enabling her to dispose of it by deed or will: *London Chartered Bank of Australia* v. *Lempriere* (1); *Heatley* v. *Thomas* (2); *Johnson* v. *Gallagher* (3); *Picard* v. *Hine* (4).

It is clear that her will was a good exercise of the power, though made during coverture: *Thomas* v. *Jones* (5). *Willock* v. *Noble* (6) is distinguishable, for there the power was exerciseable only in an event which never happened.

This being so, we submit that the appointment by the will is no satisfaction of the covenant, for the limitations differ materially; and in particular, the husband takes a contingent life estate under the covenant which he does not take under the will: *McCarogher* v. *Whieldon* (7).

[JESSEL, M.R.:—In *Bethell* v. *Abraham* (8) I remember I de-

(1) Law Rep. 4 P. C. 572.
(2) 15 Ves. 596.
(3) 3 D. F. & J. 494.
(4) Law Rep. 5 Ch. 274.
(5) 1 D. J. & S. 63.
(6) Law Rep. 7 H. L. 580.
(7) Ibid. 3 Eq. 236.
(8) 1874. March 3.

BETHELL *v.* ABRAHAM.

THIS was a suit to administer the estate of *Richard*, Baron *Westbury*.

By a settlement made in June, 1863, pursuant to articles before the marriage of the Hon. *Richard Bethell*, the eldest son of the testator, and *Mary Florence* (afterwards Lady *Westbury*), his wife, the testator covenanted with the trustee that he would, during the joint lives of himself and *Mary Florence Bethell*, pay to the trustee the annual sum of 400*l*., which sum it was thereby declared that the trustees should pay to *Mary Florence Bethell*, for her separate use, without power of anticipation. The testator also covenanted that he would by his will direct his executors to invest in such securities, and in such manner, and with such powers of variation and transposition as he should thereby express, the sum of £10,000, which it was declared that the trustee should hold upon trust during the life of *Mary Florence Bethell*, to pay the income to her for her separate use, without power of anticipation, and after her death, for her children, as therein mentioned.

The will of the testator was, so far as material to be stated, as follows:—

"All my property of every description (except the things hereinafter specifically given) I devise and bequeath to my trustees and their heirs on the trusts hereinafter mentioned."

"For the period of five years, to be computed from the day of my death, there shall be paid quarterly the following annuities . . . . To my daughter-in-law *Florence* £2000, for the maintenance of her husband and herself and the support and education of her children . . . these annual sums shall be for the separate use of my daughters and daughter-in-law, but without power of anticipation."

"At the end of the five years an account and valuation shall be made of my estate, and the following sums (with proportionate abatement if necessary) shall be paid equally . . . . To my son *Richard's* wife and chil-

cided that the rule against double portions applied to the extent of the interest on the fund settled upon Lady *Westbury* and her children under the settlement.]

We submit also that the savings of her separate income, and the railway stock, passed by her will. The power of alienation is an incident of separate estate: *Taylor* v. *Meads* (1); and the railway stock is only the furniture in another shape: *Dingwell* v. *Askew* (2).

Davey, Q.C., for *Emma Green* and her husband.

Langworthy, for *W. Mayd*, and the trustees of both settlements, contended that the difference between the trusts was such as to displace the presumption of satisfaction. He referred to *Lord Chichester* v. *Coventry* (3).

Bagshawe, Q.C., and *Decimus Sturges*, for the next of kin of *Caroline White* (having liberty to attend the proceedings) argued that after Mrs. *White* became a *feme sole* there was no separate use, and the proceeds of furniture sold after that event would not pass by will made during coverture.

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dren the sum of £10,000, upon the trusts and for the purposes of the settlement made upon *Richard's* marriage."

The testator died in July, 1873.

The Master of the Rolls decided that the testator's bequest of £10,000 to his son *Richard's* wife and children was not a performance of the covenant, and admitted the claim of the trustees of the settlement to prove as creditors for £10,000, with interest at 4 per cent. from the day of the death of the testator, minus such a sum as would have been deducted for legacy duty if the testator had performed his covenant. A summons was then taken out on the part of Lady *Westbury*, in order to raise the question whether the annuity of £2000 was intended to be a satisfaction of the interest on the £10,000 so ordered to be paid, and the summons was now adjourned into Court.

Southgate, Q.C., and *Kekewich*, for Lady *Westbury*.

Fry, Q.C., and *Everitt*, and *Roxburgh*, Q.C., and *W. Barber*, for other parties, *contrà*.

The MASTER OF THE ROLLS held that the annuity of £2000 was intended as a satisfaction of the interest on the £10,000, and must abate to that extent.

1874. June 3, 10. The LORDS JUSTICES affirmed the decision (22 W. R. 745).

Solicitors: *Gregory & Co.*; *Harrison, Beal, & Harrisons.*

(1) 34 L. J. (Ch.) 203. 4 De G. J. & S. 577. 11 Jur. N. S. 166

(2) 1 Cox, 427.

(3) Law Rep. 2 H. L. 71, 95.

M. R. JESSEL, M.R.:—

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Judgment.

The first question is, what is to be done with regard to a covenant entered into by Mrs. *White*, a married woman, who had some property settled upon her? It was settled upon such trusts as she should by deed or will appoint, and in default, upon her for life for her separate use, and after her death, on the usual trusts. The covenant was entered into some time afterwards, on the marriage of one of her daughters. She survived her husband, and died a widow possessed of considerable property.

Under these circumstances, the first question is, whether the trustees of the daughter's settlement are entitled to stand as creditors, or *quasi* creditors, against the property to which Mrs. *White* was entitled under her settlement. In other words, whether property settled as her property was separate property for the purposes of the rule that a married woman can bind her separate property for her general engagements. It seems to me that the property in question is so settled as to be within the principle, and that to hold otherwise would be to disregard that which is material for technicalities.

First of all, what do the authorities say? In the case of *Heatley* v. *Thomas* (1) the settlement was in effect a settlement of the lady's property on her during her life for her separate use, with a power of appointment by will; and it was declared that, in case she should die in her husband's lifetime without making any will or other disposition of the settled property, the trustees should hold it for the persons who would have been entitled to it in that event by way of resulting trust. The Master of the Rolls (Sir *William Grant*) held that the settlement was such a disposition of the property comprised therein to her separate use as to enable her to enter into contracts with respect to it as if she were a *feme sole*. She had power to dispose of the property at any moment, and consequently was in substance the owner of it. It is important to bear in mind that there the question was as to a married woman's bond, which was a general engagement affecting her separate property, for in the present case the covenant can only operate as a separate engagement, since it refers neither to

(1) 15 Ves. 596.

the power nor the property, and consequently cannot be supported as an execution of the power of appointment.

The next case is *London Chartered Bank of Australia* v. *Lempriere* (1). There the question arose in this way:—A fund was settled to the separate use of a married woman for her life, and afterwards as she should appoint by deed or will, and in default, for her executors, administrators, and assigns. The limitations were not precisely the same as in this case, but in stating his reasons, Lord Justice *James* says this: "It would be very inconvenient that a married woman with a large separate property should not be able to employ a solicitor, or a surveyor, or a builder, or a tradesman, or hire labourers or servants, and very unjust, if she did, that they should have no remedy against such separate property."

Of course there is no distinction between a case where the life estate precedes the power and a case where it follows it. The true view seems to be this, that, for the purpose of giving effect to the general engagements of a married woman, if property is settled upon her for life with power to dispose of it by deed or will, that is her separate property so as to be subject to her general engagements. On principle, therefore, I think the trustees are entitled to rank as creditors for the £1000.

The second question is similar to that which came before the Court in the case of *Bethell* v. *Abraham* (2). Mrs. *White* during her coverture made a will in execution of her power of appointment, and gave a sum of £1000 on trusts not materially differing from the trusts of the £1000 comprised in the settlement. As I understand the doctrine of satisfaction, an addition to a provision for a child of the child, especially where the child is a daughter, is treated by our Courts as an amplification of the trust for the child itself, and a slight difference between the trusts will not prevent the provision being within the rule against double portions. Here the difference is slight; but there is a life estate given to the husband in the settlement, and there is no such gift in the testamentary appointment. Then what is to be done as to the testamentary appointment? It is impossible to deprive the trustees of their right as creditors under the covenant; and consequently the question is, how far is the testamentary appointment satisfied by

(1) Law Rep. 4 P. C. 572. 594 (2) *Ante*, p. 590, n.

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the provisions of the settlement? The answer is, to the extent to which the daughter and her children take under the settlement. The result is, that there will be nothing coming to the daughter nor anything to her children under the provisions of the will, unless the daughter's husband survive her. To that extent, therefore, the gift by the will is not duplicated in favour of the daughter and her children.

The third question is, what is to be treated as the separate property of a married woman subject to a power of appointment, when she survives her husband. Part of the property, a dividend, was received after her husband's death; so the separate use cannot attach to that, and it passes to her next of kin. The furniture was comprised in the settlement, but she sold it, and invested the produce in railway stock. It was suggested that the stock remained subject to the power of appointment, but I cannot accede to the suggestion. She disposed of her separate property, and received the produce. The produce, that is the stock, was not her separate property, and consequently it is out of the settlement, and passes to her next of kin.

Solicitors: *W. Millman; J. Fraser.*

M. R. 1876 April 6.

In re INTERNATIONAL PULP AND PAPER COMPANY.

Winding-up—Proceedings by Creditor—Irish Court—Injunction—Jurisdiction—Companies Act, 1862, *ss.* 87, 122.

The Court has jurisdiction, under sect. 87 of the *Companies Act*, 1862, after a winding-up order has been made, to restrain any "suit, action, or other proceeding" against the company in any part of the *United Kingdom*, and has power under sect. 122 of the Act to enforce such order when made.

Accordingly, when a company with a registered office in *London*, and carrying on business in *Ireland*, had been ordered to be wound up, and proceedings were commenced against it in the Irish Courts by a creditor of the company:—

Held, that the Court had power to restrain such proceedings; and injunction accordingly.

Statement.

THIS was a motion to restrain certain proceedings in the Irish Courts affecting the Irish property of the *International Pulp and Paper Company, Limited*, in liquidation.

The company was registered under the *Companies Act*, 1862, with a central office in *London*, but its business was partly carried on in *Ireland*, where some of its property was situated.

In May, 1875, a suit was commenced in the Court of Chancery in *Ireland* by *Patrick P. Gorman*, against the company, for the specific performance of an alleged agreement for a lease. In November, 1875, *Gorman*, who had a registered judgment in *Ireland* against the company, and had thus acquired a charge on the company's Irish property, obtained an order for sale in the Landed Estates Court.

In December, 1875, an order was obtained in this Court for the winding-up of the company.

The present motion was made on behalf of the official liquidator, to restrain *Gorman*, who was not within the jurisdiction of the Court, from prosecuting his suit for specific performance, and from selling the company's property under the order of November, 1875.

Davey, Q.C., and *Methold*, for the official liquidator, in support of the motion:—

When an order has been made for the winding-up of a company whose office is in *London*, the Court has power, under the *Companies Act*, 1862, to restrain proceedings against it in any part of the *United Kingdom*.

The question of the general jurisdiction of the Court to restrain persons within its jurisdiction from prosecuting suits in foreign Courts was considered in the case of the *Carron Iron Company* v. *Maclaren* (1), where Lord *Cranworth* observed (2): "The Court acts *in personam*, and will not suffer any one within its reach to do what is contrary to its notions of equity, merely because the act to be done may be, in point of locality, beyond its jurisdiction."

The 85th section of the *Companies Act* provides that, after a winding-up petition has been presented and before the order is made, "the Court may, upon the application of any creditor or contributory, restrain further proceedings in any action, suit, or proceeding against the company." The 87th section provides that

(1) 5 H. L. C. 416. (2) 5 H. L. C. 436.

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after the winding-up order "no suit, action, or other proceeding shall be proceeded with or commenced against the company, except with the leave of the Court." These words are perfectly general, and only limited by the power of the Court itself. There is nothing to limit the jurisdiction of the Court to that part of the *United Kingdom* where the winding-up order is made. In the case of *In re Oriental Inland Steam Company* (1) it was held that when a company had in this country been ordered to be wound up, judgment creditors who were in this country would not be allowed to attach property of the company in *India*.

The 122nd section enables the Court to enforce such an order when made.

Argument.

B. B. Rogers, for *Gorman*, who appeared under protest:—

The Court has no jurisdiction to restrain the proceedings in the Irish Courts. It is clear that it could not do so under its general jurisdiction. In *Cookney* v. *Anderson* (2) Lord *Westbury* laid down that the Court had no jurisdiction out of *England* except that which was conferred by statute. The decision in that case has, no doubt, been overruled in *Drummond* v. *Drummond* (3), but that does not affect his observations as to the statutory jurisdiction of the Court. I submit that sects. 85 and 87 do not give jurisdiction to restrain the proceedings in question, for the words "no suit, action, or other proceeding" must be limited to proceedings over which the Court can exercise its jurisdiction.

Moreover, the Court has no power under the Act to enforce such an order. The 122nd section applies to the registration of orders made in one part of the *United Kingdom* in another part. In the case of *In re Hollyford Copper Mining Company* (4), where an order was made for a call by the Court of Bankruptcy in *Ireland*, in a winding-up, it was held that that order must be made an order of the Court of Chancery in *England* for the purpose of enforcing the call against contributories in *England*.

Lake, for another party.

(1) Law Rep. 9 Ch. 557.
(2) 1 D. J. & S. 365.
(3) Law Rep. 2 Ch. 32.
(4) Ibid. 5 Ch. 93.

JESSEL, M.R.:—

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This question is one of considerable importance.

First, we must consider the frame of the *Companies Act*, 1862, and ask what it was meant to do? As I read the Act, it was passed for establishing companies in the *United Kingdom*—not in one particular part of the *United Kingdom*, but "to carry on business in the *United Kingdom*, or any part thereof." The frame of the Act shews distinctly that it relates to the whole of the *United Kingdom*, and is not limited either to *England*, *Scotland*, or *Ireland*. The 4th section says that no company shall carry on business except on complying with certain conditions. The 6th section applies to registration. In the 8th section, which relates to the establishment of limited liability companies, and provides that "the memorandum of association shall contain the following things," the second requisite is: "the part of the *United Kingdom*, whether *England*, *Scotland*, or *Ireland*, in which the registered office of the company is proposed to be situate;" that is, you must make your perfect registration only where the office is, which may be in any part of the *United Kingdom;* you must select one, for reasons which are obvious upon a further consideration of the Act, but the company may go on and carry on its business anywhere in the *United Kingdom*. The same words are to be found in the 9th section, and, as to unlimited companies, in the 10th section. The 11th section, defining the form of attestation to be observed by subscribers, says "that attestation shall be a sufficient attestation in *Scotland*, as well as in *England* and *Ireland*." Therefore, up to that point we see clearly that the company may carry on business in any part of the *United Kingdom*, but must have a registered office in one part. When we come to the sections relating to the winding-up of companies we shall see the reason of that.

In the 81st section the expression "the Court," with reference to the winding-up of a company, is defined in the case of a company registered in *England* (with certain exceptions) to mean "the High Court of Chancery;" and in the case of a company registered in *Ireland*, "the High Court of Chancery in *Ireland;*" shewing that the reason for the registration is to find out the Court which is to wind it up. That makes the whole thing consistent, for, though

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the company may carry on business in any part of the *United Kingdom*, yet the place of its registered office shews the Court which is to wind it up. What is the object of winding up? It is to distribute the assets of the company rateably amongst its creditors, and enforce contributions against its shareholders or contributories, and make them pay what they are liable to pay with a view to liquidating the affairs of the company. That is the object of the Act. How is that object effected? By stopping all actions or suits brought against the company when the winding-up is commenced, so as to compel the creditors to come and share rateably. It would be a very strange result, therefore, if the Legislature, contemplating companies formed to carry on business in any part of the *United Kingdom*, or in the whole of the *United Kingdom*, should allow creditors in one part of the *United Kingdom* to go on with their actions, and not in another part, it being entirely against the spirit and meaning of the Act. Therefore, *à priori*, we should expect that in whatever part of the *United Kingdom* the Court is situate which winds up the company, that Court would have jurisdiction throughout over creditors and contributories to effect the liquidation. That is what we should expect to find when we look at the purview of the Act.

That being so, let us look what the words are. The 85th section says this: "The Court may, at any time after the presentation of a petition for winding up a company under this Act, and before making an order for winding up the company, upon the application of the company or of any creditor or contributory of the company, restrain further proceedings in any action, suit, or proceeding against the company, upon such terms as the Court thinks fit." The 87th section says that "when an order has been made for winding up a company, no suit, action, or other proceding shall be proceeded with or commenced against the company except with the leave of the Court." It has been decided that the mode of applying that provision is by applying to the Court having the control of the winding-up to stay the action, either by injunction or whatever the form may be which is adopted in that part of the *United Kingdom* where the Court is situated which has jurisdiction. The result, therefore, is that, either before the winding up or at any time after the presentation

of a petition, when the order is made no creditor is allowed to prosecute his action against the company without the leave of the Court. The words are general—"action, suit, or other proceeding." Why should I limit them? Those who say that I am to impose a limit upon those general words must shew a reason for my so doing. There can be no reason that I can find for limiting them, except that the Court has no power to enforce its order. I agree, if any creditor in *Turkey*, *Russia*, or any other purely foreign country, were to bring an action, although it would be desirable in the interests of the person concerned in the litigation to make that creditor come in with the rest, yet the Court cannot restrain the action for want of power—not from want of will or want of provisions in the Act of Parliament, but simply that the Act of Parliament cannot give this Court jurisdiction over *Turkey* or over *Russia*. That is the only reason. If there were an international Court, the power might very well be exercised. Therefore, as to a purely foreign country, it is of no use asking for an order, because the order cannot be enforced. But it has been decided in several cases that these words are general. It has been decided in these cases that the Court not only can, but ought to grant an injunction to restrain a creditor within the jurisdiction from proceeding with an action out of the jurisdiction. The only authority to be found in the Act is given by the sections to which I have referred. It shews, therefore, that "action, suit, or proceeding" ought to be read generally, because otherwise there would be no other means of restraining an action abroad. That is the positive decision, and that is the meaning of the words.

It is also a positive decision in this way: it shews that the power ought to be exercised over actions commenced abroad when the Court has jurisdiction to enforce it, that is, jurisdiction over creditors. This creditor is in *Ireland*, and I could not enforce it against him without the special authority of the Act. The 122nd section gives that special authority. It gets rid of a difficulty which was got rid of in the case of a foreign action by a creditor who was within the jurisdiction of this Court in *England* by giving a process by which this Court can enforce its order in *Ireland*, that is, that the person getting the order can record it in an Irish Court, and then enforce it in *Ireland*. It appears to me,

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therefore, following the principle of the decisions which call upon the Court to restrain a creditor within the English jurisdiction from bringing an action abroad, whether in *Ireland* or in any foreign country, I ought, on the same principle, to restrain a creditor in *Ireland*, when I can restrain him, from proceeding with his action in *Ireland*. Therefore, I hold I have not only the right to exercise the jurisdiction, but, having regard to the meaning of the Act of Parliament, I am bound to exercise it in a proper case.

Solicitors for Company: *Webster & Graham.*
Solicitors for Mr. *Gorman*: *Tathams, Curling, & Pym.*

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DICKER *v.* ANGERSTEIN.

[1874 D. 110.]

Mortgage—Power of Sale—Proviso as to Inquiry by Purchaser—Exercise of Power after Security is satisfied—Validity of Sale.

A mortgage contained a power of sale to be exercised by the mortgagee after default, with a proviso that upon any sale purporting to be made in pursuance of the power, the purchaser should not be bound to inquire whether default had been made in payment of any principal or interest, or as to the propriety or expediency of such sale, and that, notwithstanding any impropriety or irregularity in any such sale, the same should, as regarded the protection of the purchaser, be taken to be within the power, and the remedy of the mortgagor should be in damages only. The mortgagee purported to exercise the power in favour of a purchaser for value. In a suit by an incumbrancer of the mortgagor to establish his priority over the mortgagee, it was alleged that if the accounts were taken it would shew that the security was satisfied at the time of the sale:—

Held, that the sale, having been made to a *bonâ fide* purchaser without notice, was valid, even if the security should prove to have been satisfied.

Statement.

By an indenture dated the 12th of July, 1872, and made between *W. J. N. Angerstein* of the one part, and *H. E. Tidy* of the other part, *Angerstein* granted and assigned to *Tidy* all his real and personal estate by way of mortgage to secure the sum of £2800 then due to *Tidy* from *W. J. N. Angerstein*, and any further advances (which were afterwards made), not exceeding altogether £5000,

subject to a proviso for redemption on repayment of the principal money and interest on the 12th of January, 1873. And it was thereby provided that, if default should be made in payment of the principal money and interest intended to be thereby secured at the time therein mentioned, it should be lawful for *Tidy*, his executors, administrators, and assigns, at any time after the 12th of January, 1873, without any further consent on the part of the said *W. J. N. Angerstein*, to sell the hereditaments and premises thereby granted and assigned, provided always that the said power of sale should not be exercised unless default should have been made in payment of the principal money thereby secured, or the interest thereon should have been in arrear for more than three months.

The power of sale was followed by the following proviso: "Provided also, and it is hereby agreed and declared that, upon any sale purporting to be made in pursuance of the aforesaid power in that behalf, the purchaser or purchasers shall not be bound to see and inquire whether either of the cases mentioned in the clause or provision lastly hereinbefore contained has happened, or as to the necessity or expediency of the stipulations subject to which such sale shall have been made, or otherwise as to the propriety or expediency of such sale, and, notwithstanding any impropriety or irregularity whatsoever in any such sale, the same shall, so far as regards the safety and protection of the purchaser or purchasers, be deemed to be within the aforesaid power in that behalf, and to be valid and effectual accordingly; and the remedy of the said *W. J. N. Angerstein*, his heirs or assigns, in respect of any breach of the clause or provision lastly hereinbefore contained, or of any impropriety or irregularity whatsoever in any sale, shall be in damages only."

In June, 1874, *Tidy* purported to exercise the power of sale contained in the mortgage by conveying the mortgaged property to one *William Angerstein* for valuable consideration.

The bill was filed by the Plaintiff, who was an incumbrancer of *W. J. N. Angerstein's* subsequent to *Tidy*, to establish his priority over *Tidy*, and the principal question in the suit was whether the power of sale was or was not properly exercised in June, 1874, it being alleged by the Plaintiff that when the accounts were

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taken they would shew that the security was then satisfied, and that therefore the sale was invalid. The purchaser had no notice that the mortgage money had been paid off.

Argument.

Chitty, Q.C., *Philbrick*, Q.C., and *C. Browne*, for the Plaintiff:—

In this case, when *Tidy* purported to convey the property to a purchaser for value, the security was already satisfied, so that the power of sale could no longer be exercised. It may be alleged that the words of the power of sale enable the mortgagee to exercise it "notwithstanding any impropriety or irregularity" in the sale; but that must mean such an irregularity as is capable of being rectified, and cannot apply to a case where the security is at an end.

Shebbeare, for *W. J. N. Angerstein*, the mortgagor.

Fry, Q.C., and *Cozens-Hardy*, for *William Angerstein*, the purchaser.

Davey, Q.C., and *Daniel Jones*, for *Tidy*, the mortgagee.

Marten, Q.C., for the trustees in bankruptcy of the mortgagor.

Judgment.

JESSEL, M.R.:—

I have no doubt whatever as to the construction of this deed. The argument on the part of the Plaintiff, really, passes over the words of the deed. It is a mortgage of all a man's real and personal estate, not certainly in the common form, with a power of sale providing that it shall be lawful for the mortgagee at any time after the 12th of January then next, without any further consent on the part of the mortgagor, to sell the hereditaments and premises thereinbefore granted, with a proviso that he is not to execute the power of sale unless default shall have been made in payment of the principal money or interest, as therein mentioned.

Now comes the important part: "Provided also and it is hereby agreed and declared that upon any sale purporting to be made in pursuance of the aforesaid power"—that is, not a sale made, but a sale which purports to be made, and therefore the parties were contemplating that that which purported to be a sale in pursuance

of the power might not be a sale at all—that is, that the power would not be really exerciseable—"in that behalf the purchaser or purchasers shall not be bound to see and inquire whether either of the cases mentioned in the clause or provision lastly hereinbefore contained has happened, or as to the necessity or expediency of the stipulations subject to which such sale shall have been made, or otherwise as to the propriety or expediency of such sale, and notwithstanding any impropriety or irregularity whatsoever in any such sale"—the term "such sale" being a sale purporting to be made, whether really made under the power or not—"the same shall, as far as regards the safety and protection of the purchaser or purchasers, be deemed to be within the aforesaid power in that behalf"—that is, although it is not within, it is to be deemed within it—"and be valid and effectual accordingly, and the remedy of the said *W. J. N. Angerstein*"—that is, the mortgagor—"his heirs or assigns, in respect of any breach of the clause or provision lastly hereinbefore contained, or of any impropriety or irregularity whatsoever in any sale, shall be in damages only."

It appears to me that this is put in about as plain language as you can put it, that the right to sell shall be so absolutely vested in *Tidy* as to give a good title to the purchaser, that is, to a *bonâ fide* purchaser, which this gentleman is, notwithstanding that the power of sale is not really exerciseable; if it purports to be in exercise of the power, which this sale was, it is to be deemed within the power, which means that the remedy of *Angerstein* is against *Tidy* in damages, which is supposed to be a sufficient protection to the mortgagor; and no doubt, in the case of a solvent mortgagee, it is a very efficient protection. But, then, it is said it does not apply to the case where the power of sale is not exerciseable because the mortgage has been paid off. The answer is that it applies to that case as well as to every other. It is a case in which it is still a sale purporting to be made, although the mortgage money has been handed over, and the mortgagor has not taken either the precaution of getting back the mortgage deed, which he could have got back, or of getting a reconveyance, or an indorsement which would have the same effect.

That being so, he left it in *Tidy's* power to sell to a *bonâ fide* purchaser without notice, which power has been exercised; even

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assuming, as I do, for the purpose of the argument, that upon an account being taken it would shew that nothing was due to *Tidy* upon the security, I should hold that the purchaser had a good title.

I may observe, if it were not so, it would be impossible to sell at all. The whole object of the deed is to enable the mortgagee to sell without inquiry of the mortgagor. If the title to sell depends upon this payment off, the purchaser would be bound to ask the mortgagor whether anything was due. Who is to make the mortgagor answer? He would not answer at all, because he would thereby prevent the sale, and it would defeat the whole object of the parties, or rather of the mortgagee, in putting in the power of sale. It is obvious that that could not have been the intention, and, besides that, it must be recollected that the form of the conveyance is absolute and the power of sale is absolute.

That which cuts down the exercise of the power of sale in the case of no money being due is the implication which is attached by Courts of Equity to all mortgages, of their being intended as security for money only; when the money is paid off of course the security is at an end, and no power given ancillary to the security can be any longer exercised.

Where we find provisions which rebut that implication as between the purchaser and the mortgagor, as we do here, there is no occasion to resort to any such doctrine, because the obvious meaning of the whole transaction is that the purchaser is to be safe, if a *bonâ fide* one, without making any inquiry. If the mortgagor loses his estate through the misconduct of the mortgagee in selling when he has no right to sell, his only remedy would be against him personally for damages. Being, therefore, of that opinion, I must dismiss the bill with costs.

Solicitor for the Plaintiff: *H. M. Dalston.*

Solicitors for the Defendants: *Sole, Turners, & Knight,* agents for *Coaks, Norwich; Tidy, Herbert, & Tidy; Abbott & Co.; Lawrance, Plews, & Co.*

TAYLOR *v.* WITHAM.

[1875 T. 160.]

WITHAM *v.* TAYLOR.

[1875 W. 205.]

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June 14.

Evidence—Admissibility—Written Entries by Deceased Person.

Where an entry in the handwriting of a deceased person is *primâ facie* against his interest, it is admissible as evidence for all purposes, irrespective of its effect or value when received.

The following entry in the handwriting of a deceased person, "*J. W.* paid me three months' interest," which was followed by other entries pointing to a loan to *J. W.*:—

Held to be admissible as evidence, whether or not the effect of it when admitted would be to establish the existence of a debt due to the testator.

Statement.

WILLIAM FORSTER TAYLOR, the testator in the causes, by his will, made in September, 1872, gave legacies amounting in all to £3100, to certain members of his own family, and legacies to the amount of £4000 to certain members of the family of his deceased wife, including a legacy of £2000 to *James Witham*, who had married *Elizabeth Redgrove*, a niece of the testator's late wife, and, as *Witham* alleged, his adopted daughter; and the testator gave the residue of his estate to his brother *Joseph Taylor*, and appointed *Witham* and *Taylor* executors of his will.

The testator died in July, 1875, and shortly afterwards a question arose as to the legacy of £2000 to *Witham* under the following circumstances: It appeared that in December, 1871, shortly after *Witham*'s marriage, the testator had advanced him £2000, which he expended in the purchase of a house, where the testator afterwards resided with *Witham* and his wife. *Taylor*, the residuary legatee, contended that the sum of £2000 so advanced was not a gift to *Witham* but a loan, and to be repaid with interest at 4 per cent. *Witham*, on the other hand, contended that it was a gift in the nature of a marriage portion to his wife.

In September, 1875, an agreement was entered into between *Witham* and *Taylor*, whereby *Witham* purported to relinquish all claim to the legacy in consideration of *Taylor* releasing him from all liability to refund the sum of £2000 advanced by the testator.

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Witham subsequently refused to carry out the agreement. *Taylor* accordingly instituted a suit to enforce the performance of the agreement, and *Witham* instituted a cross suit to set it aside on the ground of surprise and pressure.

Both suits came on for hearing, and *Witham* gave his evidence to shew that the said advance was a gift and not a loan.

Statement.

During his cross-examination a question was raised as to the admissibility of certain entries in the testator's private account book, the genuineness of which was not disputed, and which was tendered to disprove the statement of the witness. The entries were as follows:—

"1872. Oct. 1.
J. Witham paid me three months' interest . £20 0 0"

and on another page:—

"1872. January.
J. Witham acknowledge lone (*sic*) to this date £2000.

"1872. March.	Interest.	£20	0	0
July 8.	Interest. Paid me . .	20	0	0
Oct. 1.	Interest. Paid me . .	20	0	0
Dec. 27.	Paid interest . . .	20	0	0
		80	0	0"

"1872. Dec. 27.
Paid off £20. Left £1980 0 0."

Argument.

Coolkson, Q.C., *Bosanquet*, and *Rawlins*, for *Taylor*:—

We do not dispute that these entries are in the handwriting of the testator, and were made at the time, but we contend that they cannot be admitted as evidence. They can only be admitted if they come within the general rule that entries made by a deceased person, if against his interest, are receivable as evidence of the facts stated in such entries. Here, however, we submit that the entries in the account book, so far from being against the interest of the testator, are directly in his favour, as they purport to shew that there was a sum of money due to him from *Witham* of which at present there is no extrinsic evidence: *Briggs* v. *Wilson* (1).

(1) 5 D. M. & G. 12.

Unless it can be shewn *aliunde* that the entries are against his interest, they cannot be received.

Chitty, Q.C., *Grantham*, and *Dyne*, for *Witham*:—

These entries are admissible in evidence for all purposes. It cannot be said that any of them, except the one of January, 1872, are in favour of the testator's interest. They are *primâ facie* against his interest, and it is immaterial, for the purpose of the admissibility of the entries, what will be the effect of them when admitted: *Higham* v. *Ridgway* (1).

In *Doe* v. *Vowles* (2) a deceased tradesman's bill for repairs, with his receipt thereon, was tendered as evidence of the work having been done for the person charged, and Mr. Justice *Littledale* rejected the evidence, saying, "The cases have gone quite far enough; there would be no limit if such a paper as this was admitted." That decision, however, was disapproved of by Baron *Parke* in *Reg.* v. *Inhabitants of Lower Heyford* (3), who said he thought it contrary in principle to *Higham* v. *Ridgway*.

JESSEL, M.R.:—

This question is one of very great importance, not merely in this particular instance, but in many other cases. The real question is, under what circumstances the entry made by a dead man in his books ought to be received in evidence.

It is, no doubt, an established rule in the Courts of this country that an entry against the interest of the man who made it is receivable in evidence after his death for all purposes. What is the meaning of its being against his interest? I adopt the view of Mr. Baron *Parke* in the case of *Reg.* v. *Inhabitants of Lower Heyford*, that it must be *primâ facie* against his interest, that is to say, the natural meaning of the entry standing alone must be against the interest of the man who made it.

Of course, if you can prove *aliunde* that the man had a particular reason for making it, and that it was for his interest, you may destroy the value of the evidence altogether, but the question of admissibility is not a question of value. The entry may be

(1) 10 East, 109; 2 Sm. L. C. 7th Ed. p. 310.

(2) 1 Mood. & Rob. 261.

(3) 2 Sm. L. C. 7th Ed. p. 333.

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utterly worthless when you get it, if you shew any reason to believe that he had a motive for making it, and that, though apparently against his interest, yet really it was for it; but that is a matter for subsequent consideration when you estimate the value of the testimony.

But it is said that, in order to make the entry available in evidence, you must shew by independent testimony that it is an entry against interest. The case before me is an alleged entry of payment of interest made in the testator's ordinary day-book; I need not say that it is a genuine book, because the genuineness of it is not disputed, and it is in the middle of a number of other entries.

The words are these: "October 1st, 1872. *J. Witham* paid me three months' interest £20." The *primâ facie* meaning of that entry is a receipt of money for interest by the testator. It may have a collateral effect, the words being, "Paid me three months interest," and shew that *J. Witham* owed him a debt. That may be, but that is not the natural meaning of the entry. The entry is a note in the testator's cash-book of a receipt of money by him which is naturally against his interest. If the debt were not disputed it would clearly be so, and, beyond question, the dispute of the debt makes it otherwise. In this particular case, therefore, the real value of the entry is as evidence that there was a debt. But that is a collateral circumstance; if I at once admit the entry as being naturally and *primâ facie* against interest, I should say the use which has been made of it is quite immaterial; that is according to all the authorities. But then it was said that you must be able to shew *primâ facie* that there is something to connect it with. Now, even assuming the rule could go so far as that, I do not understand that it has been anywhere laid down that you must prove the debt incontestably, though Mr. Justice *Littledale*, in the case referred to of *Doe* v. *Vowles* (1), rejected evidence which I think ought to have been received. In that case there was a bill for repairs by a carpenter with a receipt for the amount of it, and it was said there was no evidence that the repairs had been done. It was not in favour of the interest of the carpenter, because he had given a receipt for the whole bill, and I see no reason why the entry was not fairly admissible. It proved that the carpenter

(1) 1 Mood. & Rob. 261.

had been paid for what work he had done; it was, as it appears to me, clearly an entry against interest, and I so far prefer the decision of Mr. Baron *Parke* to the decision of Mr. Justice *Littledale*.

Then assume for a moment that it is necessary there must be something more, which I do not think there should, beyond its being *primâ facie* against interest. In this case we have something more proved, namely, that the testator made an advance of £2000 to Mr. *J. Witham;* it is proved that he received this £20, and, as I understand, it is one of the sums which have been proved to have been paid to him by Mr. *J. Witham*. Therefore, in this case there is certainly a good deal more than the mere entry, and if it were necessary that you should shew a *primâ facie* case also of the existence of something beyond the mere entry, I think you have it here. But I ground my decision on the first point, although I call in aid the second.

The other entries are these: "July 8th. Interest paid me £20." "October 1st. Interest paid me £20." "December 27th. Paid interest £20." As regards those three entries they are simply, "Interest paid," and they do not shew payment from anybody standing alone.

Why should a man enter in his book "Interest paid me," intending to make an entry for himself, and not against himself? Obviously the natural meaning of it is that it is against himself. "Interest" standing alone would not help him; but these entries appear to be connected with two other entries: "December 27. Paid off £20;" that is against his interest, but following that there is this, "Left £1980," and that enables you to carry your eye to the connecting entry, which is—"January, 1872. *J. Witham* acknowledged loan to this date £2000," and then you see you connect the entries with the £1980. No doubt, if admissible, it becomes very important evidence by reason of connecting it with the rest of the entry, but the entry itself is only an entry, "Interest paid me." It would not, standing alone, have been evidence of a debt from any particular person independent of the connection, and it appears to me when a man puts "Interest paid me," or "Paid off £20," it is *primâ facie* a clear entry against interest which ought to be admitted, and I admit it on the general ground; but independently of the general ground,

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there is proof that the £2000 was paid to *J. Witham*, and there is proof that every one of these four sums of £20 was actually paid to the testator, so that here again we have this fact, that there are entries not standing alone, but connected with the facts proved. I have no hesitation in saying that it is not only admissible as evidence, but is evidence of a very material character, and I rule accordingly.

All the entries were then admitted.

Solicitors: *J. L. Mathews; Prior, Bigg, Church, & Adams*, agents for *Drummond, Robinson, & Till, Croydon.*

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COMMISSIONERS OF SEWERS OF THE CITY OF LONDON *v.* GELLATLY.

[1871 L. 127.]

Action—Practice—Numerous Parties—Representation by Defendant—Enforcing Judgment against Party represented—Binding Judgment—Supplemental Proceeding.

A suit was instituted in the Court of Chancery by Plaintiffs on behalf of themselves and all other occupiers of lands and tenements within *Epping Forest*, against, amongst others, the lord of a manor within that forest and two grantees from that lord of part of the wastes of the manor. The Plaintiffs claimed to be entitled to rights of common over the wastes of the manor, and alleged that the lord of the manor in question inclosed or authorized the inclosure of large portions of the waste, so as to interfere with the rights of common, and had granted other portions of the waste to persons who made similar inclosures, and that such persons were too numerous to be made parties to the suit, but were sufficiently represented by the two grantees made Defendants thereto. A decree was made establishing the right of common claimed, and granting an injunction. After the Judicature Acts came into operation the same Plaintiffs filed a supplemental statement of claim against another grantee from the same lord, seeking to have the benefit of the decree against him, and an injunction:—

Held, on demurrer, that the Defendant was bound by the decree in the suit so that he could not litigate the right of common thereby established:

Held, also, that the proceedings for enforcing the decree against him were not purely supplemental, but in the nature of original proceedings.

Statement.

THIS was a demurrer to a "supplemental" statement of claim. The writ in the action was issued on the 13th of April, 1876.

The Plaintiffs were the Commissioners of Sewers of the City of *London* on behalf of themselves and all other the owners and occupiers of lands and tenements lying within the *Forest of Essex*, in the county of *Essex*, other than the waste lands of the said forest, except such of them as were Defendants to the further re-amended bill of complaint in the statement of claim mentioned, or were in the said bill alleged to be sufficiently represented by the Defendants thereto, or some of them, and except the Defendant to the action. The Defendant was *Peter Gellatly*.

The statement of claim stated to the following effect:—On the 14th of August, 1871, the Plaintiffs filed in the High Court of Chancery the original bill in *Commissioners of Sewers of the City of London* v. *Glasse* (1), which was afterwards amended, re-amended, and further re-amended, and as further re-amended was on behalf of the Plaintiffs and all other the owners and occupiers of lands and tenements lying within the *Forest of Essex* in the county of *Essex*, otherwise *Waltham Forest* or *Epping Forest*, other than the waste lands of the said forest, except such of them as were Defendants thereto, or were thereafter alleged to be sufficiently represented by the Defendants thereto or some of them. Among the Defendants to the further re-amended bill were *John Whitaker Maitland*, *Chamberlayne Hickman Lake*, and *John Williams*. The further re-amended bill alleged (in accordance with the fact) that the said *Forest of Essex*, commonly called *Waltham Forest* or *Epping Forest*, contained a large tract of waste and inclosed lands, and included, amongst other manors or reputed manors therein mentioned, the whole of the manor of *Loughton* (of which *John Whitaker Maitland* was lord), and that the lords and ladies of several of the manors within the forest, as such lords and ladies or in some other capacity, pretended to be entitled to inclose the waste lands of the said forest, and to dig up and destroy the pasture, turf, and other herbage growing thereon, and had respectively inclosed, or authorized or sanctioned the inclosure, of large tracts of the said wastes, and in particular that several of the Defendants had made certain inclosures from the said wastes which were specified in the further re-amended bill, and that the said *J. W. Maitland*

(1) Law Rep. 7 Ch. 456; Ibid. 19 Eq. 134.

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had authorized or sanctioned, among other inclosures within the last eight years before the filing of the said original bill, a series of inclosures containing altogether about 1300 acres, and comprising the whole of the waste within his said manor with the exception of a few small plots thereof, and had sold and granted or conveyed a piece of inclosed land (in the said bill particularly described) to the said *John Williams*, who claimed to be the owner thereof by virtue of such grant or conveyance, and that the other persons to whom portions of the waste lands within the said forest inclosed in the manner thereinbefore complained of were alleged to have been sold and granted or conveyed as aforesaid, and who claimed to be owners or occupiers of such waste lands, and the other persons, if any, who claimed to be owners or occupiers of waste lands within the said forest, were too numerous to be made parties to the said suit, and that they were sufficiently represented for the purposes of the said suit by the Defendants thereto or some of them. The said *Chamberlayne H. Lake* and *John Williams* were made parties to the said suit of *Commissioners of Sewers* v. *Glasse* (1) for the purpose of representing, and (as the Plaintiffs alleged) they did sufficiently represent, grantees of the waste lands of the said forest inclosed in manner in the said further re-amended bill mentioned. The case of *Commissioners of Sewers* v. *Glasse* was heard before the Master of the Rolls, who, on the 20th of November, 1874, made a decree declaring that the Plaintiffs and the other owners and occupiers of lands and tenements lying within that part of the *Forest of Essex*, in the county of *Essex*, now known by the name of *Epping Forest*, other than the waste lands of the said *Epping Forest*, were entitled in right of and as appurtenant to their several lands and tenements within the said *Epping Forest*, to a right of common of pasture upon all the waste lands of the said *Epping Forest* for all manner of cattle (that is to say, neat beasts and horses) commonable within the forest, levant and couchant upon their respective lands within the said *Epping Forest*, according to the assize and customs of the said *Epping Forest*; and that the Plaintiffs were entitled to an injunction to restrain certain of the Defendants (including *J. W. Maitland, C.*

(1) Law Rep. 7 Ch. 456; Ibid. 19 Eq. 134.

H. Lake, and *J. Williams*) from permitting or suffering to be or to remain inclosed or built upon any of the waste lands of the said *Epping Forest*, other than and except (*a*) lands which, on the 14th of August, 1871, were actually covered with buildings, or actually inclosed and used as the gardens belonging to or curtilages of buildings, or (*b*) lands actually inclosed on or before the 14th of August, 1851, and he granted an injunction for the purpose of giving effect to such declarations. This decree was inrolled in Chancery on the 30th of July, 1875.

The Defendant *Peter Gellatly* claimed to be the owner of and was in the possession and occupation of several pieces of land, parts of the waste lands of *Epping Forest*, and included in inclosures specified and complained of in the bill filed in the suit of *Commissioners of Sewers* v. *Glasse* (1). These pieces of land contained together 66A. 2R. 7P. or thereabouts, and were granted or conveyed by the said *John W. Maitland* on the 24th of June, 1862, and on subsequent days, as to part thereof, to the Defendant *Peter Gellatly*, and as to the residue thereof to *Edward Gellatly*, his brother, and that such of them as were formerly copyhold of the said manor of *Loughton* had since been enfranchised. These pieces of land were now fenced in or otherwise inclosed, but were not lands which on the 14th of August, 1871, were actually covered with buildings, or actually inclosed and used as the gardens belonging to or curtilages of buildings, nor lands actually inclosed on or before the 14th of August, 1851.

The Defendant *Gellatly* alleged that he was not represented in the suit of *Commissioners of Sewers* v. *Glasse*, and was not bound by the decree therein, and declined to remove the fences surrounding the said pieces of land granted to him.

The Plaintiffs claimed that the action might be taken as supplemental to the suit of *Commissioners of Sewers* v. *Glasse*; that they might have the same benefit of the decree in that suit and the same relief against the Defendant as if he had been a party to that suit; and an injunction to restrain the Defendant from permitting the said pieces of land to remain inclosed or built upon, and from carrying away the soil thereof, and injuring the turf, herbage, and pasture thereon.

(1) Law Rep. 7 Ch. 456; Ibid. 19 Eq. 134.

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Argument.

Chitty, Q.C., and *Vaughan Hawkins*, for the Defendant:—

First: The Defendant not having been a party to the suit of *Commissioners of Sewers of the City of London* v. *Glasse* (1), is not bound hand and foot by the decree made therein, so that he cannot litigate the questions over again. In giving judgment on the demurrer in that case Lord Justice *James* said (2): "It is said that the decision of this Court may prejudice people who are absent. That is a question for these people and not for the Defendants. They do not represent them, and they are not the protectors of those persons who are absent. It will only prejudice them in exactly the same way as an action against one of the tenants. Supposing an action had been brought by one of the commoners against one of the encroachers, and a verdict obtained—that, of course, to a great extent, practically would prejudice every one else, and to that extent a decree here might prejudice persons who are absent. But of course no proceedings here will ever be a *res judicata* against a person who is not present to defend himself, and it will be open to him to make any defence afterwards." No doubt the decree will be evidence, and very cogent evidence, against the Defendant, and it may be very difficult for the present Defendant to rebut that evidence; but all we contend on this occasion is, that the decree does not absolutely prevent the Defendant from litigating the question. It is right that it should be so; for the Plaintiff has the right to select the Defendants to his suit, and it is impossible for the Court in cases such as these to prevent collusion: *Powell* v. *Wright* (3). Besides, this case is different from those in which the principle of representation has been allowed; for in all those the parties represented were connected by a common link in some way, as, for example, by being tenants of the same manor, shareholders in the same company, creditors of the same estate, and so on; but the present Defendant is merely the owner of a separate inclosure, and has no connection with the persons made Defendants to the former suit.

[The MASTER OF THE ROLLS:—The Defendant is one of the very numerous owners of a particular waste.]

Secondly: The *Epping Forest Amendment Act*, 1872 (35 & 36

(1) Law Rep. 7 Ch. 456; Ibid. 19 Eq. 134.
(2) Law Rep. 7 Ch. 466.
(3) 7 Beav. 444.

Vict. c. 95, ss. 2, 3), provides that no new legal proceeding, "except such supplemental or amended bills as may be filed by the Commissioners of Sewers for the purpose of making effectual" the suit of *Commissioners of Sewers* v. *Glasse* (1) shall be instituted without leave of the *Epping Forest* Commissioners. The statement of claim does not allege that leave has been obtained, and it is therefore demurrable, *Braund* v. *Earl of Devon* (2), unless it is a "supplemental bill" within the meaning of the section. Under the old practice this would clearly not have been a supplemental suit. A bill to carry a former decree into effect is classed by Lord *Redesdale* among bills in the nature of original bills; and a supplemental bill is defined as merely an addition to the original: *Mitford* on Pleading (3). This would clearly have been an original bill against the present Defendant.

The MASTER OF THE ROLLS referred to *Mayor of York* v. *Pilkington* (4), and said that he understood the rule of the Court of Chancery, ever since Lord *Hardwicke's* time, to have been this, that where one multitude of persons were interested in a right, and another multitude of persons interested in contesting that right, and that right was a general right—and it was utterly impossible to try the question of the existence of the right between the two multitudes on account of their number—some individuals out of the one multitude might be selected to represent one set of claimants, and another set of persons to represent the parties resisting the claim, and the right might be finally decided as between all parties in a suit so constituted. No doubt the Plaintiffs must have the right of selecting the Defendants unless the persons interested in resisting the claim chose to file a bill to establish their rights, in which case the two suits would go on together as cross-suits. For example, in the present case, Mr. *Gellatly* might have filed a bill to restrain interference with his inclosures, and there might have been two Plaintiffs selecting their Defendants. But that was not done, and the Court being satisfied that the parties were fairly represented before it, and that the matter was

(1) Law Rep. 7 Ch. 456; Ibid. 19 Eq. 134.
(2) Law Rep. 3 Ch. 800.
(3) 5th Ed. pp. 36, 37.
(4) 1 Atk. 282.

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fairly contested, made a final decision of the right, and everybody interested, although not actually present, was bound by that decision, because he was present by representation. Mr. *Gellatly* was as much bound as he would have been in a suit by a shareholder who filed a bill to have the rights of the shareholders declared, as in *Henry* v. *Great Northern Railway Company* (1), though the Plaintiff in that case was only a single shareholder. But if Mr. *Gellatly* could shew fraud or collusion, or anything of that sort, or shew that the Court was cheated into believing that the case was fairly fought or fairly represented, when in point of fact it was not, then he was entitled to the same benefit of such a defence as anybody else in a similar case. Again, all that was finally decided was the existence of a general right of common, and it was open to Mr. *Gellatly* to shew that he had special ground of exemption: the decree was not final against him for any other purpose except the establishment of the general right. The Plaintiffs must, however, shew that an action to enforce such a decree was a supplemental proceeding.

Argument.

Fry, Q.C., and *W. R. Fisher*, for the Plaintiffs:—

The Defendant is clearly bound by the decree, and the proper mode of enforcing it was formerly by supplemental bill, and now by supplemental action: *Adair* v. *New River Company* (2); *Weall* v. *West Middlesex Water Works Company* (3); *Jenkins* v. *Cross* (4). Lord *Redesdale* says this: "The means of supplying the defects of a suit, continuing it if abated, or obtaining the benefit of it, are, 1, by supplemental bill."

[The MASTER OF THE ROLLS:—But he says also: "5, by original bill in the nature of a supplemental bill." I do not think you can have a purely supplemental bill after decree except when it is in the nature of a bill of revivor.]

We further submit that it is not incumbent on us to allege that we have obtained leave from the Commissioners.

[The MASTER OF THE ROLLS said that *Braund* v. *Earl of Devon* (5) was clearly in point as to that.]

(1) 1 De G. & J. 606.
(2) 11 Ves. 429.
(3) 1 Jac. & W. 358.
(4) 15 Sim. 76.
(5) Law Rep. 3 Ch. 800.

[They stated, in answer to questions put by the Court, that leave had not in point of fact been obtained, but that they believed they could obtain leave from the Commissioners.]

JESSEL, M.R. :—

This demurrer is filed on two grounds. The first is one of substance, viz., that the Defendant is not bound by the decree which I pronounced in the former case. I think, for the reasons I have already given, that he is bound by it; and in my opinion the Defendant fails on that ground.

The other ground is, that leave ought to have been given by the *Epping Forest* Commissioners before the suit was instituted. I think the Defendant is right on that point. The words in the Act are that "no legal proceedings, except such supplemental or amended bills as may be filed by the Commissioners of Sewers for the purpose of making the said suit effectual, shall, after the passing of this Act, be instituted, brought or taken." I am of opinion that this is neither a supplemental bill nor an amended bill. It is not a supplemental bill. First, it is not a bill at all, but I pass that over. I will assume it to be a bill against a new party, having for its object to enforce the decree obtained so far as regards the new Defendant. Now, that party might put in a defence shewing, for instance, that the original decree was fraudulently obtained, or that he has some special ground why his particular lands are exempt from the right in question. He is bound by the declaration that there is a right of common over the forest, but he may deny that his particular lands are part of the forest; or he may say they were disafforested before the existence of the general right, although perhaps it might be difficult for him to maintain that. However, that, in my opinion, shews the supposed bill to be an original bill; and this, therefore, ought to have been an original statement of claim. This is a point of substance if the Commissioners refuse the leave; and in that case I shall hold the Defendant is entitled to his costs, the object of the Act being that no Defendant was to be vexed with a Chancery suit without the leave of the Commissioners. But if the Commissioners give leave, then the objection is mere form, and the expense of this hearing will have been wasted. The result, therefore, in my opinion,

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ought to be, to give the Plaintiffs leave to amend by striking out the word "supplemental," and stating the leave of the Commissioners if it is obtained. If the leave of the Commissioners is not obtained within a fortnight, then the demurrer will be allowed with costs; if the leave of the Commissioners is obtained, then the costs will be reserved.

Solicitors: *Gellatly, Son, & Warton; Horne & Hunter*, agents for *Nelson, City Solicitor.*

M. R. 1876 *June* 29.

In re FRITH AND OSBORNE.

[1876 F. 75.]

Power of Sale and Exchange—Partition—Vendor and Purchaser—Title.

A power of exchange of lands is properly executed by a partition.

Accordingly, where an undivided moiety of lands was vested in *A.*, *B.*, and *C.*, as trustees of a settlement which expressly authorized a partition, and the other moiety was vested in *D.*, *E.*, and *F.*, as trustees of a settlement, with power to sell, dispose of, convey, and assign the said hereditaments for such a price in money, or for such an equivalent or recompense in lands and hereditaments as to the trustees should seem reasonable, and for that purpose to revoke the old uses and to limit other uses and trusts, and a partition deed, purporting to be in exercise of the said powers, was executed by the trustees of the two moieties:—

Held, that the partition was properly effected by *D.*, *E.*, and *F.*, under their power.

Semble, a partition between any number of persons might properly be effected under a similar power.

The *dictum* in *Sheppard's* Touchstone (1), that "joint tenants, tenants in common, and coparceners cannot exchange the lands they do so hold with another before they have made partition"—questioned.

Statement.

THIS was a summons, taken out under the *Vendor and Purchaser Act*, 1874, for the purpose of obtaining the opinion of the Court on the validity of a partition deed, purporting to be made in exercise of a power of sale and exchange, so far as the same related to the hereditaments comprised in the first schedule thereto, which were the subject-matter of an intended purchase.

By an indenture dated the 3rd of April, 1861, the undivided

(1) Page 292.

moiety of certain hereditaments devised by the will of a testatrix were conveyed unto and to the use of *F. Falkner*, *G. Skinner*, and *S. P. Townsend*, in fee, as trustees of the settlement of Mr. and Mrs. *Fitzmaurice*, upon trust as therein mentioned; and it was provided that it should be lawful for the said trustees, at the request of *Fitzmaurice* and his wife, or the survivor of them, to join and concur with the persons entitled to the other undivided moiety of the said hereditaments in making a partition thereof, and for that purpose, by any deed or deeds, to revoke the uses and trusts thereinbefore declared, and to declare any uses, estates, or trusts of the said hereditaments which it should be thought necessary or expedient.

By an indenture dated the 9th of May, 1865, the other undivided moiety of the hereditaments devised by the said will were conveyed unto and to the use of *H. Frith*, *W. Ross*, and *John Sparks*, in fee, upon and for the trusts and purposes of an indenture of settlement of even date therewith. And by the last-mentioned indenture of settlement (made in pursuance of articles on the marriage of Mr. and Mrs. *Frith*) it was agreed that the said *H. Frith*, *W. Ross*, and *J. Sparks*, therein called "the said trustees," should stand possessed of the said undivided part upon trust as therein mentioned; and it was thereby agreed that it should be lawful for the said trustees, with the consent of *Frederick Frith* and his wife, to sell, dispose of, convey, and assign the said hereditaments and premises, or any part thereof, to any person or persons, by way of absolute sale for such a price in money, or by way of exchange for such equivalent or recompense in lands and hereditaments as to the said trustees should seem reasonable, and for that purpose to revoke, determine, and make void all or any of the uses, trusts, powers, and provisoes therein expressed and contained as to all or any part or parts of the said hereditaments and premises of which the trusts were therein expressed (except leases made in execution of the power thereby given), and to limit and appoint any such new or other use or uses, trust or trusts, of or concerning the same hereditaments and premises, or any part or parts thereof, as they should think necessary or expedient.

By a deed of partition dated the 22nd of February, 1868, between Mrs. *Fitzmaurice* (who had survived her husband), of the first part,

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Falkner, Skinner, and *Townsend,* of the second part, Mr. and Mrs. *Frederick Frith,* of the third part, and *Henry Frith, Ross,* and *Sparks,* of the fourth part, after reciting that it had been mutually agreed to make a partition of the hereditaments comprised in the schedule thereto in the shares and in manner thereinafter appearing—one undivided moiety of the same hereditaments being then held by *Falkner, Skinner,* and *Townsend,* as trustees of the settlement of the 3rd of April, 1861, and the other undivided moiety by *Henry Frith, Ross,* and *Sparks,* as trustees of the settlement of the 9th of May, 1865—it was witnessed that, in pursuance of the said agreement, and for effectuating the said intended partition, they the said *Falkner, Skinner,* and *Townsend,* at the request of Mrs. *Fitzmaurice,* and in exercise of the power given to them by the settlement of the 3rd of April, 1861, revoked the uses and trusts thereby declared concerning their undivided moiety of the hereditaments comprised in the first part of the schedule to the said partition deed, and declared that the same should thenceforth be held upon the trusts, and with and subject to the uses, trusts, and purposes in and by the settlement of the 9th of May, 1865, contained and declared concerning the undivided share of the hereditaments therein comprised; and it was thereby further witnessed that, in further pursuance of the said agreement, the said *Henry Frith, Ross,* and *Sparks* (with the consent of *Frederick Frith* and his wife), in pursuance of the power given to them by the settlement of the 9th of May, 1865, revoked the uses, trusts, and powers in the same settlement expressed and contained concerning their undivided moiety of the hereditaments contained in the second part of the said schedule, and limited, appointed, and conveyed the same undivided moiety unto and to the use of *Falkner, Skinner,* and *Townsend,* upon and for the trusts and purposes of the indenture of the 3rd of April, 1861.

The trustees of Mr. and Mrs. *Frith's* settlement having contracted with *Alexander Osborne* for the sale to him of certain lands comprised in the first part of the schedule to the partition deed of the 22nd of February, 1868, the question was raised by the intending purchaser whether the partition was properly effected under the power of sale and exchange in the settlement of the 9th of May, 1865.

Whitcombe, for the vendors, submitted that the partition was authorized by the power of sale and exchange contained in the settlement of the 9th of May, 1865. He referred to *Abel* v. *Heathcote* (1), *M'Queen* v. *Farquhar* (2), *Doe* v. *Spencer* (3), *Attorney-General* v. *Hamilton* (4), *Bradshaw* v. *Fane* (5), *Sheppard's* Touchstone (6), and Lord *St. Leonards* on Powers (7).

W. W. Karslake, for the purchaser.

JESSEL, M.R. :—

Judgment.

The first question which I have to decide is whether an ordinary power of sale or exchange does or does not authorize a partition, and I prefer putting my decision upon the broad ground, though I will shew presently that this title is quite independent of that ground. The title depends upon a deed which was originally articles for a settlement, and which has been carried into effect by an actual settlement, by which the legal estate was conveyed to trustees of the names of *Frith*, *Ross*, and *Sparks*, and the power contained in the settlement was to sell, dispose of, convey, and assign the said hereditaments and premises, which refers to what was conveyed, which was "an undivided moiety." [His Lordship then read the power.]

If you read the words of that power, it will be seen that it is not in fact a power simply to exchange, but it is to sell, dispose of, convey, and assign by way of absolute sale or by way of exchange. Of course the word "sell" refers to "sale," and the word "exchange" refers to "dispose of," and, therefore, it comes to this, whether a trust (for this is a trust estate) including a power to dispose of by way of exchange for an equivalent in other lands and hereditaments, authorizes trustees to dispose of the undivided moiety, which they are empowered to dispose of, for another undivided moiety. Why it, should not I cannot conceive upon the words. It is to dispose of the undivided moiety by way of exchange for such equivalent in value of hereditaments, which

(1) 4 Bro. C. C. 278; 2 Ves. 98.
(2) 11 Ves. 467.
(3) 2 Ex. 752.
(4) 1 Madd. 214.
(5) 3 Drew. 534; 2 Jur. (N.S.) 247.
(6) Page 292.
(7) Pages 856–857.

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includes an undivided moiety, as they may think fit. They think fit to dispose of this undivided moiety by way of exchange for another undivided moiety. The words are not "in exchange," but "by way of exchange," but I do not much rely upon that. Standing alone, one is at a loss to see what the doubt is. Upon this particular instrument no doubt the word "hereditaments" includes an undivided moiety. They may convey their own undivided moiety by way of exchange for an undivided moiety of some other lands. Why may they not for an undivided moiety of lands which happen to be held under the same settlement?

If one were reading this for the first time, and did not know anything of real property law, it would not be easy to see what the doubt could be. That it is doubtful is plain from Mr. *Dart's* book (1), where he says it is doubtful. Upon looking at the last edition of Lord *St. Leonards* on Powers in the year 1861, he does not put it so strongly. He says (2): "It has frequently been a question amongst conveyancers whether the usual power of sale and exchange does not authorize a partition"—that is, does not authorize a partition in effect, because when I come to look at what was done in this case, though the parties recite that they intend to make a partition, what they do is to convey an undivided moiety in consideration of the other undivided moiety in the other lands being conveyed to them. It is not a strict partition, but a conveyance by way of partition; that is how they actually carry it out. Then he says, "And several partitions have been made by force of such powers under the direction of men of eminence. This point underwent considerable discussion on the title, which afterwards led to the case of *Abel* v. *Heathcote* (3). Mr. *Fearne* thought that the power did authorize a partition, on the ground that the partition was in effect an exchange." Then he discusses the case, which I shall have to discuss again, of *M'Queen* v. *Farquhar* (4), and concludes: "Until the question shall receive a further decision, it can scarcely be considered clear that a power to exchange will authorize a partition."

He does not, therefore, go so far as to say it is doubtful, but says "until the question shall receive a further decision it can scarcely

(1) Page 78.
(2) Pages 856, 857, 859.
(3) 4 Bro. C. C. 278.
(4) 11 Ves. 467.

be considered clear." From this I should imagine that Lord *St. Leonards* thought that it ought to be decided that it was clear. He comments on *Doe* v. *Spencer* (1), and says that "if they were right in holding, as they did, that at common law two tenants in common may exchange with each other their respective moieties of the different parts of the land held in common, it must follow, where the moiety of an estate is settled to uses with a power of exchange in the trustees, that such a power may be well executed by dividing the lands into two portions to be held in severalty, one on the uses of the settlement, the other by the party entitled to the other moiety."

In this passage where he says "if they were right," he means by the use of the word "if" to intimate a doubt. Whether the Judges who decided *Doe* v. *Spencer* were right or wrong, he does not know; but assuming *Doe* v. *Spencer* to be right, he says it must follow that such power may be well executed by a partition. Therefore, according to Lord *St. Leonards*, the only thing remaining doubtful was whether *Doe* v. *Spencer* was right.

This being a question as to the law of real estate, it does not depend upon the individual notion of any Judge as to what the law ought to be, but upon what is decided by authority. It is too late to argue any question as to real estate law in this country upon principle. Real estates are held upon title; the law is founded upon the extraordinary caprices of former real property lawyers, supposed to be derived from the rules of feudal tenure. It is often impossible to find the principle upon which a decision is founded, or whether there is any principle at all; therefore it becomes incumbent upon every Judge to look at the authorities, and to see how far the authorities have settled the law, and to follow them implicitly if he finds that the law is settled.

The case of *Abel* v. *Heathcote* (2) is the first case which it is necessary to refer to. The best report of it is to be found in *Brown's* Chancery Cases. That seems to be decisive of this particular case before me at all events, because the words are to my mind undistinguishable. There the legal estate was in trustees, which was very much relied on by Lord *Loughborough*, who decided the case. The words were, "to make sale of and convey, sur-

(1) 2 Ex. 752. (2) 4 Bro. C. C. 278; 2 Ves. 98.

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render, and assure, or convey in exchange, for or in lieu of other manors, lands, and hereditaments, all or any of the said freehold and copyhold lands, &c., thereby granted for the best price in money, or for such other equivalent in manors, lands, or hereditaments as should to them, the trustees, seem reasonable." Here the words are "such equivalent or recompense in lands or hereditaments," which are plainly undistinguishable. I think that the criticism of Lord *St. Leonards*, in his treatise on Powers (1), upon Lord *Eldon's* judgment, speaking with great deference of such great authorities, is not well founded. I think that Lord *Eldon* was right in construing the words "to make sale of, and convey, surrender, and assure, or convey in exchange," as being separate things. There might be something on an exchange which required a surrender, as well as on a sale, and he read it "to make sale of and convey, settle, and assure, or to convey and exchange." I think that is a fair reading, and that evidently was the opinion of Sir *Thomas Plumer*, who, in commenting upon it in *Attorney-General* v. *Hamilton* (2), evidently thought that the words were to be read in that way, and I must take the construction as these Judges have taken it. In the opinion of Lord *Eldon*, who doubted the general proposition attempted to be laid down by Lord *Loughborough*, at all events *Abel* v. *Heathcote* (3) was well decided, because, if the power were to convey "for such equivalent in lands as the trustees should think fit," you might convey an undivided moiety, and in that way there would be a partition, and *Abel* v. *Heathcote* would still be an authority. But Lord *Loughborough* went further. Though the Commissioners doubted and differed, when the case came before Lord *Loughborough* he laid down the general proposition that the ordinary power of sale and exchange would authorize partition, and it was not until the case of *M'Queen* v. *Farquhar* (4) that there was any doubt about it; but when *M'Queen* v. *Farquhar* was argued before Lord *Eldon*, he expressed his doubts about it. He there says (5): "In the ordinary settlements of great estates, powers of sale, partition, exchange, &c., are inserted. As to the first special caution is used, if there is not a

(1) Page 857.
(2) 1 Madd. 214.
(3) 4 Bro. C. C. 278; 2 Ves. 98.
(4) 11 Ves. 467.
(5) 11 Ves. 475.

previous power of revocation, to declare at what time the uses shall be revoked and the seisin shall attach upon the new use, and no cesser or determination of the old uses or creation of new uses arises, except in the very circumstances described. This is a power of revocation, but to the intent to do some other act, and that intent, as prescribed by the instrument, must accompany the revocation in order to make the revocation effectual. It is clear this was not disturbed by decision, though there were floating opinions, until the case of *Abel* v. *Heathcote* (1). I doubt whether the language I hear and have read, that a power of exchange is well executed by a partition, is authorized by anything in that decision. Exchange and partition are very different, according to *Sheppard's* Touchstone (2) and other old books. You cannot exchange till there has been a partition. There is infinite difficulty in saying a partition under the execution of a power by a tenant for life with those who have the inheritance in the other moiety could be called an exchange." If that means anything, it means this, that, having legal uses to deal with, exchange is different from partition, and you cannot exchange until after partition. That is the ground of Lord *Eldon's* doubt in that judgment. Of course, therefore, after that decision it must be considered, and was treated by Sir *Thomas Plumer* in *Attorney-General* v. *Hamilton* (3), as too doubtful a question, whether the ordinary power to exchange would authorize partition, to force a title depending upon it on a purchaser.

The next case which bears upon the subject is *Doe* v. *Spencer* (4). For ordinary purposes the power to exchange in the *Inclosure Act* there referred to is not distinguishable from the ordinary power of exchange in a settlement. And there the question was, whether that which was carried out as a partition could be effected under the power of exchange; and the learned Judge, Mr. Baron *Rolfe*, afterwards Lord *Cranworth*, delivered the judgment of the full Court of Exchequer that it could. That was a question of common law, and the point arose directly whether there was any substantial difference, as was put in *Sheppard's* Touchstone, between exchange and partition, and the Court decided that, as

(1) 4 Bro. C. C. 278; 2 Ves. 98.
(2) Page 292.
(3) 1 Madd. 214.
(4) 2 Ex. 752.

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regards tenants in common at all events—and these people are tenants in common—there is no ground for such an assertion. I may notice that Mr. *Preston*, in his valuable edition of *Sheppard's* Touchstone (1) does put in brackets, after the *dictum*, "What objection is there to the exchange of one undivided moiety?" He could not find any objection. But whatever the authority that *Sheppard's* Touchstone standing alone would be as a recognised text-book, it has been overruled by *Doe* v. *Spencer* (2). It is there laid down that it is essential that an exchange, properly so called, should be made between the two parties. The judgment then proceeds:—"But if *A.* and *B.* be tenants in common of *Blackacre* and *Whiteacre*, we can discover no principle which is to prevent *A.* from giving his moiety of *Blackacre* to *B.* in exchange for *B.'s* moiety of *Whiteacre*." And judgment was given accordingly. That is an express decision (of course I must not go further than the decision) that a power of exchange, where an undivided moiety is settled, does enable you to make a partition by exchanging with the owner of the other undivided moiety.

The only other case which it is necessary to cite is *Bradshaw* v. *Fane*, reported in *Drewry* rather shortly (3), and more fully in the Jurist (4). The question there arose on title, and the point was not decided, because it was considered doubtful. Vice-Chancellor *Kindersley* says: "First of all, there is the abstract question which has been so much disputed, both before me now and in several other cases, whether the ordinary power of exchange authorizes a partition; that is to say, not only a partition strictly in the form of a partition, but also in the form of an exchange. . . . Now, as to the abstract question, the conclusion at which I shall arrive is this—that so far as the decision upon this question turns upon this point, I must consider it too doubtful to force the title upon an unwilling purchaser. The authorities stand thus. The earliest case is that of *Abel* v. *Heathcote* (5), in which Lord *Rosslyn* certainly expressed his opinion that a power of sale would authorize a partition, at all events in that particular case. In *M'Queen* v. *Farquhar* (6) the question was raised by Lord *Eldon* whether the

(1) Page 292.
(2) 2 Ex. 752.
(3) 3 Drew. 534.
(4) 2 Jur. (N.S.) 247.
(5) 4 Bro. C. C. 278; 2 Ves. 98.
(6) 11 Ves. 467.

power of sale authorized a partition, and that gave rise to a discussion as to the power of exchange; and Lord *Eldon*, commenting on *Abel* v. *Heathcote* (1), expressed his opinion strongly that a power of exchange would not authorize a partition, and that *Abel* v. *Heathcote* depended upon the special words, and, though we have no report of the case to which reference was made, yet it appears from a note in *Belt's* edition of *Brown's* Chancery Cases (2) that Lord *Eldon* expressed an opinion that a power of exchange would not authorize a partition. In *Attorney-General* v. *Hamilton* (3) the question was whether certain persons should be made parties, which depended upon whether a power of sale so authorized a partition as that it was unnecessary to have these parties before the Court, and it was considered so doubtful that they were held necessary parties. Then came the case of *Doe* v. *Spencer* (4), in which the judgment of the present Lord Chancellor was given, the question arising under an Inclosure Act, which authorized exchanges, the language of the Act being much the same as that in ordinary powers, and there all the cases were commented on, and it was said that there is no authority for that which is laid down in *Sheppard's* Touchstone (5). There a clear decision was come to by the Court of Exchequer that in the case of two coparceners it might be done, but where there were three it could not. Now, so far as I am at liberty to express an opinion, I should say that I agree in the proposition that the rule as laid down in the Touchstone is not correct as to tenants in common, though it may be as to joint tenants." Then he goes on to say he does not see why, if the thing may be done as between two, it may not be done as between three or more. This is another point which is not now before me. It very seldom occurs, and perhaps it is not worth discussing. Then he says, "But after this case the question arose in the case of *Brassey* v. *Chalmers* (6), which was under a power to sell and dispose of, and the question was whether these words, either by themselves or taken in conjunction with the other words, would authorize a partition, and it is evident that the opinion of the Master of the Rolls was that it was a doubtful question, and I

(1) 4 Bro. C. C. 278; 2 Ves. 98.
(2) 4 Bro. C. C. 285.
(3) 1 Madd. 214.
(4) 2 Ex. 752.
(5) Page 292.
(6) 16 Beav, 223.

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think the inclination of his mind was that it would not. These, I believe, are the only authorities which can be brought distinctly to bear upon the question, and with the exception of *Abel* v. *Heathcote* (1) and *Doe* v. *Spencer* (2), they are *dicta* merely. Then, if we refer to the text-books, we find that Lord *St. Leonards*, whose authority in every respect stands higher than that of any other person, represents the matter as being still uncertain. *Chance* (3) is of opinion that it is unsettled. *Jarman* (4) expresses his opinion to be that a power of exchange would not justify a partition. *Preston*, in his note to the Touchstone, says he does not think the position in the Touchstone to be good law. This is the state of the authorities; but I confess that, looking at it as a question turning on the ordinary power of sale and exchange, the matter remains in such a state of doubt and uncertainty that I could not force such a title upon an unwilling purchaser." So he winds up by stating his opinion really to be in favour of the exchange power including the partition, but he says that it is so doubtful upon the authorities, that he would not decide the abstract proposition so as to force the title upon an unwilling purchaser. Then he did decide the case upon another point, on the wording of the power, and he held that the title was good; so that, though he would not decide the abstract proposition, he held the title good upon the exercise of the power.

That is the state of the authorities. Lord *St. Leonards* says that it wants another decision to make it quite clear. I am willing to give the decision (supposing the doubt is not taken away by the decision of the Court of Exchequer followed by the Vice-Chancellor *Kindersley*), that the passage in the Touchstone is not good law, and that you can have such an exchange, and if you can have such an exchange, why could not the power authorize the exchange of an undivided moiety in *Whiteacre* for another undivided moiety in *Blackacre?* I decide that it does. We have conflicting opinions between what the Judges said in *Doe* v. *Spencer* and what the Vice-Chancellor intimated his opinion to be. It is not necessary for me to decide that question. I must say, if I had to decide it, I should feel inclined to follow the

(1) 4 Bro. C. C. 278; 2 Ves. 98.
(2) 2 Ex. 752.
(3) Page 147.
(4) 6 Jarm. Conv. 594.

opinion of the Vice-Chancellor instead of the Court of Exchequer, for if it can be done as between two, I do not see why it could not be done as between more than two, but I have not to decide that question now.

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Solicitors for Vendors: *Sandys & Freeman*, agents for *J. & W. B. Sparks, Crewkerne.*

Solicitors for Purchaser: *Wood, Street, & Hayter*, agents for *Budge, Crewkerne.*

TAWELL *v.* SLATE COMPANY.

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July 8.

[1876 T. 159.]

Practice—Action for Recovery of Land—Foreclosure Action—Rules of Court, 1875, *Order* XVII., *r.* 2.

A foreclosure action is not an action for the recovery of land within the meaning of Rules of Court, 1875, Order XVII. rule 2.

WHITEHORNE applied under Rules of Court, 1875, Order XVII., rule 2, for leave to join in one writ claims for the administration of the trusts of a mortgage deed given to secure debentures issued by a company, and for foreclosure of the mortgage; and stated that the application was made in consequence of doubt having arisen whether a foreclosure action was not an action for the recovery of land within the meaning of the rule which he cited.

JESSEL, M.R., said that an action for foreclosure was not an action for recovery of land within the meaning of the rule, and therefore the causes of action might be joined without leave.

Solicitors: *C. C. Ellis & Co.*

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July 8.

In re BROOKE.
BROOKE *v.* ROOKE.

[1876 B. 326.]

Will—Construction—Charge of Legacies on Real Estate—Direction for Payment of Debts and Legacies by Executors—Gift of Legacies followed by Gift of Residue of Real and Personal Estate in one Mass.

Ch D. 504
Ch D. 165-6

The rule that legacies followed by a gift of real and personal residue in one mass are charged on the real estate, applies although preceded by a direction that the debts and legacies shall be paid by the executors.

A testatrix by her will directed her debts and funeral and testamentary expenses, and the legacies thereby bequeathed, to be paid by her executors thereinafter named, and after bequeathing specific and pecuniary legacies and making a specific devise, she gave the residue of her real and personal estate to *A.* and *B.* upon certain trusts, and appointed *A.* and *C.* executors :—

Held, that the legacies were charged on the residuary real estate of the testatrix.

Statement.

ELIZABETH BROOKE, widow, by her will, dated the 21st of April, 1875, directed her debts and funeral and testamentary expenses, and the legacies thereby bequeathed, to be paid by her executors thereinafter named as soon as conveniently might be after her decease; and after bequeathing certain pecuniary legacies and certain specific articles, the testatrix devised a freehold messuage, No. 4, *Royal Crescent, Bath*, with the appurtenances, together with the furniture, plate, linen, china, glass, books, pictures, prints, and other household effects therein at her decease unto her sons, the Plaintiffs *Henry Brooke* and *William John Brooke*, their heirs, executors, and administrators respectively, upon the trusts therein mentioned, being in effect trusts for the said *Henry Brooke* during his life, and after his death for such one or more of his children as he should by deed or will appoint, and in default of appointment for such of his children as being sons should attain the age of twenty-one years, or being daughters should attain that age or marry; and if there should be no such child, upon similar trusts for the said *William John Brooke* during his life, and after his death for his children; and if there should be no such child of the said *William John Brooke*, then upon

similar trusts for her daughter *Elizabeth Mary Rawlinson* during her life, and after her decease for her children. And after bequeathing her consumable stores and three life annuities, and other pecuniary legacies as therein mentioned, as to all the residue of her real estate and chattels real, including her mansion called *The Mount* and her lands and hereditaments situate in the parishes or hamlets of *Harrow* and *Roxeth*, in the county of *Middlesex* and elsewhere, and as to all the residue of her personal estate and effects the testatrix gave the same unto and to the use of the Plaintiff *Henry Brooke* and the Defendant *Ernest Wallace Rooke*, thereinafter called her trustees, their heirs, executors, administrators, and assigns respectively, upon trust for sale and conversion as therein mentioned; and the testatrix declared that her said trustees should stand possessed of the clear moneys to arise from the sale of her said residuary real estate and chattels real, and from the calling in, collection, and conversion of her said residuary personal estate, and of any ready money of which she should die possessed, as to one equal undivided moiety thereof, upon trust for the Plaintiff *Henry Brooke*, his executors, administrators, and assigns absolutely; and as to the other moiety thereof, upon trust for her said trustees to invest the same in manner therein mentioned, and to stand possessed of such investments for the same upon trusts for the benefit of the Plaintiff *William John Brooke* during his life, and from and after the determination of such trusts in favour of the Plaintiff *William John Brooke* in trust for such one or more of the children of the Plaintiff *William John Brooke* as the said Plaintiff should by deed or will appoint, and in default of and subject to such appointment, in trust for all the children or any the child of the said Plaintiff who being sons or a son should attain the age of twenty-one years, or daughters or a daughter attain that age or marry; and if there should be no such child, for such persons as the said Plaintiff should by will appoint; and in default of such appointment, and so far as any such appointment if incomplete should not extend, in trust for the statutory next of kin of the said Plaintiff as therein mentioned. And the testatrix appointed the Plaintiff *Henry Brooke* and the Defendant trustees of her will, and the Plaintiffs executors thereof, and she declared that the Defendant should be entitled to charge for all

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business done by him as a solicitor in respect of her estate in the same manner as if he had not been a trustee of her will.

The personal estate of the testatrix was sufficient for payment of her debts and funeral and testamentary expenses, but proved insufficient for payment of her legacies, and this action was brought in order to obtain the opinion of the Court as to whether the legacies were charged on the real estate of the testatrix.

Argument.

Woodroffe, for the Plaintiffs:—

It was decided in *Greville* v. *Browne* (1) that if legacies are given generally, and the residue of the real and personal estate is then given in one mass, the legacies are a charge on the residuary real estate. That rule must give way to indications of contrary intention; and here the testatrix, by directing the legacies to be paid by her executors, who are different persons from her trustees, has shewn that she meant the legacies to be paid out of personal estate only.

Northmore Lawrence, for the Defendant, referred to *Gyett* v. *Williams* (2).

Judgment.

JESSEL, M.R.:—

I have no doubt that the rule, which is thoroughly well established, having been acted on by the Court of Chancery for 200 years, and having been confirmed by a decision of the House of Lords, is not affected by the distinction attempted to be made here. The rule is this: that if you give legacies generally, and then give the residue of the real and personal estate in one mass, that charges the legacies on the residuary real estate. Here legacies are given generally, and then the residue of the real and personal estate is given in one mass; and it is not denied that that would charge the legacies on the residuary real estate, were it not that it is said that a contrary intention is shewn by the direction that the legacies shall be paid by the executors, who are not the trustees of the will. It is to be observed, however, that the direction is, that the debts as well as legacies shall be paid by the executors; the testatrix could not, even if she wished it, have

(1) 7 H. L. C. 689. (2) 2 J. & H. 429.

exempted her real estate from payment of debts; and, that being so, there is not, in my opinion, any indication of an intention to exempt it from payment of legacies. I am of opinion that the residuary real estate is well charged with the legacies.

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Solicitors: *Robinson & Preston*, agents for *Burne & Rooke, Bath.*

BLACKMUR *v.* BLACKMUR.

M. R. 1876 *July* 10.

[1874 B. 105.]

Fines and Recoveries Act (3 & 4 *Will.* 4, *c.* 74), *ss.* 81, 82—*Acknowledgment by Married Woman—Perpetual Commissioners—Commissioners for Different Counties.*

Commissioners who take the acknowledgment in *England* of a married woman under the *Fines and Recoveries Act* need not be appointed for the county in which the acknowledgment is taken.

Statement.

THIS was the further consideration of an administration suit. One share of the proceeds of certain real estate situate in *Middlesex* belonged, under the will of the testator in the cause, to a married lady residing in *Middlesex*, who by a deed acknowledged before two commissioners appointed under the *Fines and Recoveries Act*—one for *Essex* and the other for *Middlesex*—assigned her interest in the real estate to trustees upon certain trusts. The lady died two days afterwards. Upon an application to file the certificate of acknowledgment a difficulty arose in consequence of the decision of the Court of Common Pleas in *Webster* v. *Carline* (1) to the effect that both commissioners must be appointed for the county in which the acknowledgment is taken; but ultimately Chief Justice *Bovill* directed the certificate to be filed, in order (as was stated in a memorandum signed by him) that the acknowledgment might have effect as far as possible. It was now asked that the lady's share might be paid to the trustees of this deed.

Cracknall, for the trustees, called the attention of the Court to the point.

(1) 4 Man. & G. 27.

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E. T. Holland, and *Colt*, for other parties.

JESSEL, M.R.:—

But for the decision in *Webster* v. *Carline* (1), I should have thought the provisions of the *Fines and Recoveries Act* quite plain. By the 81st section perpetual commissioners are to be appointed for every county; then the 82nd section provides that any person appointed commissioner for a particular county or place "shall be competent to take the acknowledgment of any married woman wheresoever she may reside, and wheresoever the lands or money in respect of which the acknowledgment is to be taken may be." In *Webster* v. *Carline* Chief Justice *Tindal* is reported to have said: "That cannot mean that the commissioners are to act except in the county for which they are appointed. Otherwise what would be the use of appointing them for separate counties?" With the very greatest deference for that learned Judge, I am unable to take that view of the Act. It appears to me that the object of appointing commissioners for separate counties was in order that commissioners might be at hand wherever they were wanted; and that the 82nd section provides that a commissioner, once appointed, shall be competent to take acknowledgments anywhere. I think Chief Justice *Bovill* could not have taken the same view of the Act as Chief Justice *Tindal*, otherwise he would not have allowed the certificate to be filed; and, of course, if he had refused to allow it to be filed, the acknowledgment would have been worthless; but as the certificate has been filed, I am of opinion that the acknowledgment is good, and I shall direct the fund to be paid to the trustees of the deed.

Solicitors: *A. Crossfield*; *Turner & Son.*

(1) 4 Man. & G. 27.

D'EYNCOURT *v.* GREGORY.

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July 15.

[1861 D. 89.]

Heirlooms—Sale—Jurisdiction.

The Court has no jurisdiction to order a sale of heirlooms which are settled in strict settlement, simply on the ground that a sale would be for the benefit of all parties interested.

Statement

GREGORY GREGORY, the testator in the cause, was entitled in fee simple to real estate, in the county of *Nottingham*, of the annual value of £5000 or thereabouts: he was also tenant for life of other estates in *Lincolnshire* of much larger value. On the latter estate he erected a very large mansion, and expended about £300,000 in erecting it and in purchasing suitable furniture and a large collection of pictures, tapestries, plate, and works of art, which were displayed in the rooms of the mansion.

By his will, dated the 22nd of November, 1848, the testator devised his estates in *Nottinghamshire* to uses in strict settlement in favour of (among other persons) *John Sherwin Gregory* for life, with divers remainders over. The testator then devised the estates in *Lincolnshire*, of which he was tenant for life, to the same uses; and he gave the furniture and other articles to trustees as heirlooms to go along with the estates; and he directed that in case any person made by his will tenant for life, or issue of such person, should fail to procure the *Lincolnshire* estates to be settled in accordance with the uses declared by the testator's will, then all the estates devised by the will, and the articles thereby made heirlooms, should thenceforth go and remain as if the uses in favour of the person so failing had not been inserted.

The testator died in 1854. *John Sherwin Gregory*, who was tenant in tail of the *Lincolnshire* estates, refused to settle them in accordance with the will of the testator; and in consequence of such refusal the *Nottingham* estates and the articles bequeathed as heirlooms had become vested in persons who were not entitled to the *Lincolnshire* estates. All the debts of the testator had long since been paid.

The present tenant for life of the *Nottinghamshire* estates and of

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the heirlooms now presented a petition in a suit instituted to administer the trusts of the testator's will, stating that the mansion-house on those estates was of a moderate size, quite inadequate to hold the heirlooms; that he himself resides in another mansion-house not subject to the uses of the will of the testator, and also of moderate size; that the heirlooms were at present packed up in the last-mentioned mansion, and completely occupied many of the rooms in it, causing great inconvenience to the Petitioner and his family; that there was no room to display them there, and that they were sustaining damage and deteriorating in value by reason of the impossibility of giving them proper attention; and praying that the heirlooms might be sold, or otherwise that he might be at liberty to apply for an Act of Parliament to enable the trustees of the will to sell them.

Argument.

Chitty, Q.C., and *Method*, submitted that the Court had jurisdiction to order a sale: *Fane* v. *Fane* (1); and that this was a proper case for exercising the jurisdiction.

Bagshawe, Q.C., and *Plucknett*, for the Respondents, including persons entitled in remainder, some of whom were infants, offered no opposition.

Judgment.

JESSEL, M.R.:—

I am of opinion that this Court has no jurisdiction to sell chattels settled in strict settlement any more than (independently of the Leases and Sales of Settled Estates Acts) it has to sell real estate settled in strict settlement: and the Leases and Sales of Settled Estates Acts do not apply to chattels. I have no doubt that in this case a sale would be for the benefit of all parties interested; but all I can do is to give leave to make an application to Parliament for the purpose. In *Fane* v. *Fane* there were mortgage debts remaining unpaid; and of course, if the testator's debts remained unpaid in the present case, a sale might be made for the purpose of paying them off; but it appears they have all been paid.

Solicitor: *T. D. Bolton.*

(1) 2 Ch. D. 711.

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[1876 T. 6.]

April 12.

Pleading—Evasive Denial—Rules of Court, 1875, *Order* XIX., *rr.* 17, 20, 22—*Dissolution of Partnership.*

In an action for dissolution of partnership, the Plaintiffs by their statement of claim alleged that they and the Defendant had agreed to take a lease of certain premises and to enter into partnership; that draft articles of partnership were considered and approved by the Plaintiffs and Defendant at an interview on a day named, subject to their being finally revised by the Defendant's solicitor; that the draft articles had not yet been revised, nor the articles executed; that, although the draft articles were only settled subject to revision, the terms of the arrangement between the Plaintiffs and Defendant as therein provided were definitely agreed upon at the said interview; that the Defendant had not intimated any objection to the terms of the articles; that it was soon afterwards agreed that certain sums should be brought in by the Plaintiffs and Defendant; that they had proceeded with the partnership undertaking, and the Defendant had taken an active part in it, but that he had not contributed his share, and notice had been given him to withdraw from the undertaking.

The Defendant, in his statement of defence, admitted that he had agreed to enter into partnership as alleged, and added, "The Defendant denies that the terms of the arrangement between himself and the Plaintiffs were definitely agreed upon as alleged":—

Held, that the denial was evasive within Rules of Court, 1875, Order XIX., rule 22:

Held, also, upon motion for judgment on admissions of fact in the pleadings under Order XL., rule 11, that there should be a decree for dissolution, with an inquiry, if desired by the Defendant, as to the terms of the arrangement for partnership.

Observations on the strictness with which the rules as to pleading should be construed by the Court, having regard to Order XIX., rules 17, 20, 22.

Statement.

THIS action was brought by the Plaintiffs, *W. Thorp* and *M. Stackpoole*, for the purpose of obtaining a dissolution of their partnership with the Defendant.

The Plaintiffs filed their statement of claim, by which they alleged that, in August 1875, they and the Defendant had agreed to take a lease of a brickfield and to carry on in partnership the business of brick manufacturers, and that in pursuance of such agreement they procured to be granted to them a lease of the premises for forty-two years, and had since purchased the plant and stock-in-trade of the former lessees.

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The Plaintiffs further alleged, in paragraph 3 of their statement of claim, that early in the same month they and the Defendant caused draft articles of partnership to be prepared for the purpose of defining the terms of the partnership; that the said draft articles were considered and approved by the Plaintiffs and Defendant at an interview between them on the 17th of September, subject to their being submitted by the Defendant to his solicitor, and being revised and finally settled by him; that the said draft had not yet been revised, and the articles had not yet been executed; that, although the draft articles were only settled subject to revision, the terms of the arrangement between the Plaintiffs and the Defendant as therein provided were definitely agreed upon at the interview, and the Defendant procured the Plaintiff *Stackpoole* to sign the draft articles to prevent any question being raised by him as to the terms agreed upon; and that neither the Defendant nor his solicitor had intimated any objection to the terms of the said draft articles.

The Plaintiffs further alleged that soon afterwards it was agreed between them and the Defendant that the sums to be brought in by the Plaintiff *Thorp* and the Defendant should be £1000 each; that the Plaintiffs and Defendant had proceeded with their partnership undertaking; that the Defendant had taken an active part in the proceedings of the business, but had never contributed his share of the capital, and that notice had been given to him to withdraw from the undertaking.

The Plaintiffs claimed that it might be declared that they and the Defendant were co-partners upon the terms provided by the draft articles, and that the partnership might be dissolved.

The Defendant, in his statement of defence, admitted that he had agreed with the Plaintiffs to enter into partnership and take a lease as alleged by the Plaintiffs, and that in doing so he had relied on the sum which he required as his share of the capital being advanced by his trustees, who had since refused to make the advance, and proceeded as follows:—

"With respect to paragraph 3 the Defendant says that his solicitors abstained from finally revising and settling the draft articles of partnership until the said trustees should determine whether or no they would make the above-mentioned advance.

The Defendant denies that the terms of the arrangement between himself and the Plaintiff were definitely agreed upon as alleged."

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The Plaintiffs now moved for judgment upon the admissions of fact in the pleadings under Order XL., rule 11, of Rules of Court, 1875.

Argument.

Chitty, Q.C., and *G. Sangster Green*, for the Plaintiffs:—

The admissions of fact by the Defendant are sufficient to entitle the Plaintiffs to a decree for dissolution. The Defendant admits the partnership, and his denial "that the terms of the arrangement between himself and the Plaintiff were definitely agreed upon as alleged" is evasive within the meaning of rule 22 of Order XIX.

Cookson, Q.C., and *Whipham*, for the Defendant:—

The answer of the Defendant is sufficiently specific, as he denies that the terms of the agreement were such as the Plaintiff alleges were agreed to at the interview on the 17th of September. It is not necessary for him to say what the terms were. Indeed, it would be a great hardship on the Defendant if he were required to state specifically the terms of a parol agreement which he is called upon to perform when they are imperfectly set forth in the statement of claim. At any rate, the Defendant should have leave to amend.

Judgment.

JESSEL, M.R.:—

It is as well to say that in construing the pleadings with regard to Order XIX., rule 22, I shall construe them strictly. It was intended that they should be construed strictly, in order specially to enable the Plaintiff to know what the real issue between him and the Defendant was. The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules of Order XIX. was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to definite issues, and thereby to diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.

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Judgment.

The 11th rule of Order XL. enables the Plaintiff or Defendant to get rid of so much of the action as to which there is no controversy. That is the meaning of it. It may be that the whole issue may not be in controversy, and thereupon either party may be entitled to move on admissions of fact in the pleadings. What amounts to admissions of fact in a pleading is defined by the 17th rule of Order XIX: "Every allegation of fact in any pleading . . . if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted." Consequently, all you have to find is no specific denial or no definite refusal to admit.

Then the question is what "if not denied specifically" means, and that is again defined in subsequent rules. The 20th rule says: "It shall not be sufficient for a Defendant in his defence to deny generally the facts alleged . . . in a defence by way of counterclaim, but each party must deal specifically with each allegation of fact of which he does not admit the truth." There, it will be seen, it is not merely denial which is meant, but the rule covers non-admission, for each party is to deal specifically with every allegation of fact of which he does not admit the truth. Therefore, he must be quite as specific under the 20th rule when he says "I do not admit" as when he says "I deny." In fact, they are both covered by the 20th rule.

Then, in order that there shall be no mistake as to the meaning of the word "specifically" in the 20th rule, the 22nd rule says this: "When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum, or any part thereof, or else set out how much he received. And so, when a matter of fact is alleged with divers circumstances, it shall not be sufficient to deny it as alleged along with those circumstances, but a fair and substantial answer must be given."

Applying that rule to the pleadings in the present case, let us see what comes of it. The Plaintiffs allege an agreement to take a lease and to carry on a partnership. They allege that, in pur-

suance of the agreement, they took a lease, and that the draft articles were prepared to define the terms of the partnership; that there was an interview on the 17th of September, and that the same were approved by the parties subject to being submitted by the Defendant to his solicitor, and being revised and finally settled; that the draft had not yet been revised, and the articles had not yet been executed, and that, although the draft articles were only settled subject to revision, the terms of the arrangement between the Plaintiffs and Defendant, as therein provided, were definitely agreed upon at the said interview, and the Defendant procured the Plaintiff *Stackpoole* to sign the draft articles in order to prevent any question being raised by him as to the terms agreed upon. Then they allege that they subsequently carried on the business, and that the Defendant had taken an active part in carrying it on.

The Defendant does not deny a word of these allegations, except that part which alleges that the terms were definitely settled, and as to that he says; "The Defendant denies that the terms of the arrangement between himself and the Plaintiffs were definitely agreed upon as alleged." Now that is evasive. "As alleged" means the whole allegation in the statement of claim, not the allegations of the particular paragraph. I cannot tell from his pleading what part of the allegation of the Plaintiffs the Defendant intends to deny. He may intend to deny that the terms were definitely agreed upon at the interview of the 17th of September, although they were at some other day, or he may have some peculiar view as to the meaning of the word "definitely." He may not be able to say that the terms were not arranged as agreed upon, but he may take the word "definitely," because he thinks it may give him some mode of escape. I cannot make out what he means. He is bound to deny that any agreements or any terms of arrangement were ever come to, if that is what he means; if he does not mean that, he should say that there were no terms of arrangement come to, except the following terms, and then state what the terms were; otherwise there is no specific denial at all.

Mr. *Cookson* submitted to me that it was a great hardship on a Defendant who was asked to perform a parol agreement, the terms

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of which were not accurately stated by the Plaintiffs, to be compelled by his own pleadings to state what the terms were. It would be a very extraordinary notion of the administration of justice to treat such a complaint seriously. It is the very object we have always had in view in pleading to know what the Defendant's version of the matter is in order that the parties may come to an issue. If you have an agreement for a lease containing fifty stipulations made by parol, and the Plaintiff and Defendant both agreed that there was such an agreement, and, except as to one of the fifty stipulations, that it had been carried out and acted upon, what would be said of a Court of Justice if it allowed the Defendant simply to deny that there was any such agreement as alleged, so that the Plaintiff should be compelled to come to trial with witnesses to prove every one of the fifty stipulations of the agreement? Of course the Defendant ought to admit that forty-nine were made, and deny the fiftieth, and then the cause would come to a trial upon the question whether the fiftieth stipulation alleged did or did not form part of the agreement. That is not hard upon a Defendant: it is the proper mode of carrying on the administration of justice. That is the meaning of the rules, and I have said as much as I have done in order that solicitors may be aware in future that I shall insist upon the rules of pleading being complied with.

There will be the usual decree for dissolution, and, if desired by the Defendant, an inquiry what were the terms of the partnership.

Solicitors for Plaintiffs: *Maddox, Green, & Cobbold.*
Solicitor for Defendant: *J. B. C. Huxham.*

HALE *v.* HALE.

M. R.

1876

July 17.

[1875 H. 43.]

Will—Remoteness — Rule against Perpetuities — Gift to Class consisting of Children and Grandchildren who attain Twenty-four — Severance of Shares.

A testator gave his real and personal estate to trustees upon trust for his wife during widowhood, and after her death or second marriage for his children who might be living at such death or second marriage, and the issue of any child who might have previously died, such issue to take the share of her or his deceased parent in equal shares, the shares of such of his children or grandchildren as should be a son or sons to become vested in and payable to them as and when he or they should respectively attain the age of twenty-four years, and the shares of his daughters, or the female issue of any deceased child, to be settled as therein mentioned :—

Held, that the whole of the gifts after the life interest of the widow were void for remoteness.

In re Moseley's Trusts (1) disapproved of.

Statement.

THIS was the further consideration of a suit for the administration of the will of *William Hale*, who by his will, dated the 22nd of August, 1867, gave his residuary real and personal estate to his wife, *Anne Hale*, and to *Frederick Hale* and *Nathaniel Warren Hale*, upon trust to get in and convert certain parts of his personal estate, and invest the same as therein mentioned, and to pay the income of such investments, and of all his real and his other personal estate, to *Anne Hale* during widowhood, and after her death or second marriage upon trust to sell all his outstanding real and personal estate. The will then proceeded as follows :—

"And I direct that my said trustees shall stand possessed of the net proceeds arising therefrom for all and every of my children who may be living at the time of such death or second marriage, and the issue of any child who shall have previously departed this life, such issue to take the share of his, her, or their deceased parent in equal shares and proportions, the shares of such of my children or grandchildren as shall be a son or sons to become vested in and payable to him or them as and when he or they

(1) Law Rep. 11 Eq. 499.

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shall respectively attain the age of twenty-four years. And as to the shares of my daughters, or the female issue of any deceased child, upon trust to invest the same upon the securities hereinbefore mentioned, and to pay the annual income arising from such investment into the proper hands of my said daughters or granddaughters for their respective sole and separate use and benefit for and during the term of their natural lives, without power of anticipation, and the same not to be subject or liable to the debts, control, or engagements of any husband with whom they or either of them may intermarry, and her and their receipts alone, whether covert or sole, shall be the only proper discharge to my said trustees for their respective shares. And I empower my said daughters or granddaughters, or either of them, by will to appoint, give, and bequeath a life interest in the whole or any part of their respective shares to any surviving husband or husbands, and after the decease of my said daughters or granddaughters or either of them, upon trust, subject to such appointment, if any, as aforesaid, for all or any of the lawful issue of my said daughters or granddaughters for such interest, in such proportions, and in such manner in all respects as my said daughters or granddaughters, or either of them, by their or her last will and testament in writing may appoint. And in default of such appointment, in trust for the child, if only one, or for all the children equally, if more than one, of my said daughters or granddaughters who shall be living at the time of their respective decease, and shall have attained or shall live to attain the age of twenty-four years. And in case either of my said daughters or granddaughters shall die under the age of twenty-four years without leaving issue, or leaving issue all such issue shall die under that age, then the share or shares of such of my daughters or granddaughters so dying shall go to and be divided equally amongst all my children who shall be then living, and be paid and payable to him or them upon the same terms and conditions as his, her, or their original share or shares under this my will."

And the testator empowered his trustees to apply the income of the contingent shares of his children and issue in or towards their maintenance during minority.

The testator died on the 3rd of November, 1874, leaving his

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widow and two sons and four daughters him surviving. All the children had attained the age of twenty-four years at the time of the testator's death, with the exception of one daughter, who was of the age of sixteen. Two of the daughters had married, and had infant children living at the testator's death.

Argument.

Chitty, Q.C., and *H. A. Giffard*, for *Anne Hale*, the widow of the testator, submitted that the gifts subsequent to the life interest conferred on her were void for remoteness, and consequently that she was absolutely entitled to one-third of the testator's personal estate as on an intestacy. It was quite clear that it could not be ascertained what grandchildren would take until the lapse of a period which might exceed a life or lives in being at the testator's death, and twenty-one years afterwards; consequently the shares even of those members of the class who had attained twenty-four at his death could not be ascertained, so as to be incapable of augmentation or diminution within the perpetuity limits. The gift was therefore bad: *Cattlin* v. *Brown* (1). The case of *Smith* v. *Smith* (2) was in point.

Davey, Q.C., and *Seward Brice*, for the testator's children and grandchildren, contended that the question could not be decided now, but that the parties must wait until the period of distribution arrived, in order to ascertain which of the shares had vested at that time: *In re Moseley's Trusts* (3).

Cookson, Q.C., and *Owen*, for other parties.

Judgment.

JESSEL, M.R.:—

I am of opinion that the gifts after the death or second marriage of the testator's widow are void for remoteness. The doctrine on the subject is perfectly well settled. A will takes effect at the death of the testator, and any gift made by it is void for remoteness if it does not necessarily take effect within twenty-one years from the termination of any life then in being. The question here is, whether the class of objects whom the testator means to

(1) 11 Hare, 372, 377. (2) Law Rep. 5 Ch. 342.
(3) Law Rep. 11 Eq. 499.

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benefit are necessarily ascertainable within that time. The class consists of the children and grandchildren, being issue of deceased children of the testator, that is to say, if at the death of the widow there are any sons living, or there are any grandchildren living who are the sons of a deceased child, they are to take vested interests at the age of twenty-four years. In this will it is clear that "vested" means vested. The rule as to the construction of the word "vested" as laid down by Sir *W. Grant* is, that it has its proper legal meaning like every other word, unless you find a context to control it. In this case there is no context to control it, but, on the contrary, in the maintenance clause express mention is made of there being contingent shares. "Vested," therefore, means vested, and, consequently, neither son nor grandson can take a vested interest until he attains the age of twenty-four years. At the death of the testator the widow was alive, and she had children. No human being could tell at the death of the testator how many of such children would die in the lifetime or before the second marriage of the widow, nor whether any such child so dying would leave sons or not, and if the child so dying left sons, whether or not they would attain the age of twenty-four years. The result might be that a child might die in the lifetime of the widow, or before her second marriage, leaving a son under the age of one year, the widow might then die or marry, and such son might not attain twenty-four years of age within the legal period; and, consequently, you could not within that period ascertain the class to take, for that is the important point. The class you could ascertain in one sense: you could say that at the death of the widow the class could not exceed a given number, that is to say, it could not exceed all the children then living and all those who died in her lifetime leaving children; and you could say at the testator's decease that in no case could the whole class to take exceed the whole number of the testator's children, because grandchildren would only come in the place of children. In that sense the class is ascertainable; but in the other sense it is not. You could not tell how few there would be to take. You might have a division according to the number of children; then a child might die leaving a son who might attain twenty-four after the legal period, and then that share ought to come back to the others

if you could divide it; but you could not. It must remain absolutely uncertain what share each child would take until it was ascertained whether the grandchildren attained twenty-four or not. The shares were not necessarily ascertainable at the death of the tenant for life, for you could not find out what share each child would take, although you could find out that each child must at least have a certain share. That being the state of the law, could you sever the shares? that is, could you say, I will give to each child his minimum share, and only declare so much to be void for remoteness as he may possibly take beyond the legal period? There, again, you would have to wait for the period of distribution to find out the share, unless you took the minimum share to be determined by the number of shares at the testator's death, in which case you would have a minimum share in the sense that a son who had then attained twenty-four must take that amount at all events, although he might be entitled to more. As I understand it, *Leake* v. *Robinson* (1), and the whole of that class of cases, negative the possibility of doing so. You must ascertain the whole share in order to get out of the decisions. According to the other mode of dealing, the minimum share might be given to each child who answered the description at the testator's death, leaving the law as to remoteness to take effect as regards the difference between the maximum and the minimum share; but that is not the rule laid down by this Court, which has held the whole gift void unless you can ascertain the shares within the period. The rule has been acknowledged in every case on the subject; and it is only necessary to refer to two or three of them. One is the case of *Smith* v. *Smith* (2), which is very like this indeed. It was decided originally by Vice-Chancellor *Malins*, who held you could sever the shares. It then went to the Court of Appeal, who reversed the decision on the ground I have mentioned, that the class must be ascertainable within the period, and you cannot separate the shares by calculating the minimum shares beforehand. That decision would be binding upon me if I had any doubt upon the question, which, however, has been settled so long ago as *Leake* v. *Robinson*. Besides that, there is the case of *Seaman* v. *Wood* (3), which is exactly this case.

(1) 2 Mer. 363. (2) Law Rep. 5 Ch. 342.
(3) 22 Beav. 591.

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There the late Master of the Rolls held that, as you could not ascertain the shares necessarily within the limited period allowed by law, the whole gift was void. He said (1): "In my opinion the class here to take consists of the children who attain twenty-one, and a limited class of the grandchildren, namely, those who attain twenty-one, but are children of children who have died under twenty-one. Therefore, the class to be ascertained consists of the Plaintiff's own children and the grandchildren who attain twenty-one born of deceased infant parents. There is a direction afterwards as to what shares they are to take. The children are to take equal shares, and the grandchildren collectively are to take the shares which their parents would have taken if they had lived. This class will not necessarily be determined within the period allowed by the rule against perpetuities. I think that this is a gift to a class which is too remote, and that the principle of *Leake* v. *Robinson* (2) applies." That is exactly in point. I think *Smith* v. *Smith* (3) is also fairly in point. Then there is the case of *In re Moseley's Trusts* (4), decided by Vice-Chancellor *Malins* in the year 1870, the same year as the appeal was decided in *Smith* v. *Smith*. It is exactly in point, and it is exactly the other way. Therefore, in one sense, I have to elect between *Seaman* v. *Wood* (5) and *In re Moseley's Trusts*, but in another I have not to elect, because, if I am right in my view of *Smith* v. *Smith*, it decides the point independently of the conflict of opinion between the Judges in *Seaman* v. *Wood* and *In re Moseley's Trusts*. When you look at *In re Moseley's Trusts*, you see that the Vice-Chancellor does not deny the rule. He says this (6): "It was argued for the residuary legatee that the gift is void for remoteness because it includes objects who could not necessarily be ascertained within twenty-one years after the termination of a life in being at the death of the testator. If the gift had been to the children and grandchildren as a class, that would undoubtedly have been the case, because the grandchildren would not necessarily be twenty-one years of age within twenty-one years after the death of their grandmother, but here the number of objects must be ascertained

(1) 22 Beav. 595.
(2) 2 Mer. 363.
(3) Law Rep. 5 Ch. 342.
(4) Law Rep. 11 Eq. 499.
(5) 22 Beav. 591.
(6) Law Rep. 11 Eq. 502.

within twenty-one years after t…he death of the testator." [I think that here the Vice-Chancello…r forgot that they might diminish: he was thinking of the maxi…mum number.] "It is to the children who attain twenty-one, an…d the issue of those who die under that age, so that necessarily t…he whole number of the class will be ascertained within a life …n being and twenty-one years. The property, therefore, is to be …divided into as many shares as the number of children who attai…n twenty-one and who die under that age leaving issue, and t…he issue are to take just that which the parent would have t…aken if he had lived to attain twenty-one years." As I read the gift …in *In re Moseley's Trusts* (1), it was to the issue which should afte…rwards attain the age of twenty-one years: that was a part of th…e description of the issue, and therefore it was a mistake to say …you could divide the number of shares into as many as there …are children who are alive and children who died leaving issue …; there is no gift to the issue as such; only to such as attain twen…ty-one. That is the mistake which, as it seems to me, the Vice-C…hancellor made in that case. He said you ascertain the number o…f shares by seeing which children left issue, but leaving issue a…t does not determine the point; it is leaving issue and such Lor…d attaining twenty-one.

case …oking at the principle and the authorities, I think in this wi… the grandchildren not being capable of being ascertained in… within the period allowed by law, the gift wholly fails for remoteness.

Solicitors: *Jenkinson, Owen, & Olivers.*

(1) Law Rep. 11 Eq. 499.

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July 24.

GOODCHILD *v.* 1)OUGAL.

[1876 G. 123.]

Married Woman—Real Estate—Deed acknowledgd—Dispensing with Concurrence of Husband—Fines and Recoveries Act (3 & 4 *Will.* 4, c. 74), *s.* 91.

Where a married woman has, under sect. 91 of the *Fines and Recoveries Act*, obtained an order of the Court of Common Pleas dispensing with her husband's concurrence, she may dispose of her real estate by a deed which is not acknowledged by her.

Statement.

THIS was a demurrer to a statement of clain 1. The Plaintiff had agreed to sell to the Defendant certain real estate situate in the county of *Surrey*, and the action was, in fon n, for specific performance of the agreement; but the real object was to obtain the opinion of the Court whether an objection raised by the Defendant to the Plaintiff's title was valid.

The Plaintiff claimed under one *Jane Traviss*, who was entitled to the property in question in fee simple. Being so entitled, she, in October, 1857, intermarried with one *Christian Thiel*, who in the following month deserted her, and never returned to her.

In January, 1860, *Jane Thiel* obtained from the Court of Common Pleas an order, under the 91st section of the *Fines and Recoveries Act* (1), that she should be at liberty to dispose of all her

(1) 3 & 4 Will. 4, c. 74, s. 91: "Provided always, and be it further enacted, that if a husband shall in consequence of being a lunatic, idiot, or of unsound mind, and whether he shall have been found such by inquisition or not, or shall from any other cause be incapable of executing a deed, or of making a surrender of lands held by copy of Court roll, or if his residence shall not be known, or he shall be in prison, or shall be living apart from his wife, either by mutual consent or by sentence of divorce, or in consequence of his being transported beyond the seas, or from any other cause whatsoever, it shall be lawful for the Court of Common Pleas at *Westminster*, order to be made in a summar upon the application of the wif upon such evidence as to the said C shall seem meet, to dispense with concurrence of the husband in any c in which his concurrence is required this Act or otherwise; and all act deeds, or surrenders to be done, executed, or made by the wife in pursuance of such order, in regard to lands of any tenure, or in regard to money subject to be invested in the purchase of lands, shall be done, executed, or made by her in the same manner as if she were a *feme sole*, and when done, executed, or made by her shall (but without pre-

and interest in the property without the concurrence of her husband, *Christian Thiel*, it appearing to the Court that *Christian Thiel* was then, and had been since 1857, living separate and apart from his wife, and that his residence was unknown.

Accordingly, *Jane Thiel*, by a deed signed, sealed, and delivered by her under and by virtue of the said order, and dated the 1st of February, 1861, conveyed the property to the Plaintiff. This deed was not acknowledged by *Jane Thiel*.

Statement.

Both *Christian Thiel* and *Jane Thiel* were dead.

The Defendant's objection was that the 91st section of the *Fines and Recoveries Act* did not dispense with the necessity for acknowledgment, but only with the making her husband a party, and consequently that the deed ought to have been acknowledged.

W. P. Dickins, for the Defendant:—

Argument.

In order that the deed of a married woman may be effectual under the *Fines and Recoveries Act*, two things are necessary: first, acknowledgment by her; and, secondly, the concurrence of her husband: sect. 77 of the Act. Sections 79, 80, and 84 deal with acknowledgment; and under sect. 89 the Court of Common Pleas has power to make orders and regulations as to the mode of taking acknowledgments. That power has been exercised; and from the sections of the Act referred to, and the rules made by the Court of Common Pleas, it appears that the commissioner who examines her is bound to ascertain—1, that she is of full age; 2, that she is of competent understanding; 3, that she is acting voluntarily; and, 4, that she has received the consideration (if any) for which the deed purports to be given. When you come to sect. 91, it will be found that the object of that clause is to get rid of the concurrence of the husband, but not to dispense with the protection thrown around the married woman by acknowledgment. It is true the section says that the married woman may execute the deed as if she were a *feme sole*; but execution is one

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judice to to the rights of the husband as then existing independently of this Act) be as good and valid as they would have been if the husband had concurred . . ."

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thing and acknowledgment another. It might lead to great frauds if acknowledgment were dispensed with; for example, a husband, having used threats towards his wife in order to make her execute a deed, might go away on purpose that an order under the 91st section might be obtained; and so his wife would be deprived of the protection afforded to her by the law.

Cookson, Q.C., and *T. A. Roberts*, for the Plaintiff.

Judgment.

JESSEL, M.R.:—

This case raises the neat question whether where a married woman has obtained an order of the Court of Common Pleas under sect. 91 of the *Fines and Recoveries Act* dispensing with her husband's concurrence, her deed requires acknowledgment; and I am of opinion that it does not.

By the 77th section of the Act it is provided, in the first place, that it shall be lawful for every married woman by deed to dispose of lands as fully and effectually as she could do if she were a *feme sole*. Then comes a proviso that no such disposition shall be valid unless the husband concur in the deed by which the disposition is effected, nor unless it be acknowledged by the married woman as afterwards directed. So that the operation of the section is this; a married woman has power given her to dispose of land, but the power cannot be effectually exercised without the concurrence of the husband and without acknowledgment. Sections 79 to 85 deal with acknowledgment; and by sect. 80 the married woman is to be examined apart from her husband as to her knowledge of the deed, and as to whether she freely and voluntarily consents to it. The object of acknowledgment, therefore, is to protect the married woman against the coercion or blandishments of her husband, or what may be called undue influence by him; the Legislature has interposed this for the protection of the wife as against her husband. The object of requiring the concurrence of the husband is different. By the law of this country a married woman cannot dispose of her property without her husband's consent; and the concurrence of the husband is for his benefit and for that of his children, acknowledgment being for the benefit of the wife.

These two limitations on the free power of disposal by the wife having been inserted, it occurred to the framer of the Act that in some cases the concurrence of the husband cannot be obtained; and sect. 91 deals with these cases. The cases which the section deals with are where the husband, in consequence of being lunatic, idiot, or of unsound mind (whether so found by inquisition or not), or from any other cause, is incapable of executing a deed or making a surrender; or where the husband's residence is unknown, or is in prison, or is for any reason living apart from his wife; and it is provided that in those cases the Court of Common Pleas may, upon the application of the wife, dispense with the concurrence of the husband in any case in which his concurrence is required by the Act or otherwise; and the section then proceeds: "and all acts, deeds, or surrenders to be done, executed, or made by the wife in pursuance of such order, in regard to lands of any tenure, or in regard to money subject to be invested in the purchase of lands, shall be done, executed, or made by her in the same manner as if she were a *feme sole*, and when done, executed, or made by her shall (but without prejudice to the rights of the husband as then existing independently of this Act) be as good and valid as they would have been if the husband had concurred."

Now, as to the meaning of the earlier words, that all acts, deeds, or surrenders shall be done, executed, or made by the wife "in the same manner as if she were a *feme sole*," there can be no doubt. Those words cannot refer to the mere actual execution of the deed, because there is no difference in form between the execution by a married woman and by a *feme sole;* and if the words referred only to that, they would be unnecessary. They must include everything which is required in order to make the deed effectual. That, I think, is clearly the meaning of that part of the section.

Then come the words which raise the doubt, "and when done, executed, or made by her shall (but without prejudice to the rights of the husband as then existing independently of this Act) be as good and valid as they would have been if the husband had concurred;" that is to say, the husband is to be bound so far as his concurrence was necessary to enable the wife to dispose of her interest, but any independent interest of his own is not to be

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affected. Upon this it is contended that necessity for acknowledgment by the wife is not done away with, because the Act only provides that the deed is to be as valid as if the husband had concurred. But considering that the whole object of acknowledgment is to protect the wife against the husband's influence, and that the cases in which his concurrence is dispensed with are all cases in which it is impossible that he can influence her, I think the true meaning of the section is that in those cases she is for all purposes to be a *feme sole*, and consequently that acknowledgment is in those cases unnecessary. The demurrer must, therefore, be overruled.

It was then arranged between the parties that judgment for specific performance should be given.

Solicitors: *Pritchard & Sons*, agents for *Wheeler & Sargeant, Wokingham*; *F. L. Soames*, agent for *T. W. T. Cooke, Wokingham.*

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DAY *v.* RADCLIFFE.

[1876 D. 78.]

Settlement—Construction—Words—"Payable"—Trust for Children at Twenty-one or on Marriage and Issue of Children dying before their Shares became "payable."

17 Ch. D. 837

By a settlement reciting a royal warrant directing a sum of £1000 to be paid to trustees for the benefit of *A. D.* and *J. D.* and children of *A. D.*, it was declared that the trustees should stand possessed of the £1000 upon trusts for investment and payment, and application of the income to or for the benefit of *A. D.* and *J. D.* during their respective lives, and from and after the deceases of *A. D.* and *J. D.* upon trust to pay, divide, or transfer the £1000, and all dividends or interest which might be due thereon, unto and amongst all and every the child and children of *A. D.*, and the issue of such child and children, if more than one, in equal shares and proportions, and if but one, then the whole to such one, and to be paid and transferred to such children or child as should be sons or a son at the age of twenty-one years, and to such children or child as should be daughters or a daughter at the age of twenty-one years, or day of marriage, whichever should first happen, the issue of any child or children whose parent or parents should die before his, her, or their share or shares should become payable to be entitled to the share or shares which his, her, or their parent or parents would have

been entitled to if living. A son of *A. D.* attained twenty-one, and died in the lifetime of *A. D.* leaving a child:—

Held, that the child of the son so dying was entitled to the parent's share of the trust fund.

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Statement.

DEMURRER to a statement of claim containing allegations to the following effect:—

By an indenture dated the 31st day of May, 1815, and expressed to be made between *Giles Loder* and *Samuel Foot* of the first part, *John Day* and *Ann* his wife of the second part, and *Henry Charles Lichfield*, solicitor of the Treasury, of the third part, after reciting that the Prince Regent, on behalf of His Majesty, had by royal warrant directed the sum of £1000 (part of the estate of *John Follett*, deceased) to be paid to the said *Giles Loder* and *Samuel Foot* for the benefit of the said *Ann Day* and *John Day*, and of the children of the said *Ann Day*, and that the said sum of £1000 had accordingly been paid to the said *Giles Loder* and *Samuel Foot*, It was witnessed that in obedience to the said warrant it was thereby declared between the parties thereto of the first and second parts, with the consent and approbation of the said *Henry Charles Lichfield*, that the said *Giles Loder* and *Samuel Foot*, their executors and administrators, should stand possessed of the said £1000 upon the trusts following (that was to say): Upon trust, in the first place, immediately to lay out and invest the same in the public funds at interest, in the names of the said *Giles Loder* and *Samuel Foot*, and to stand possessed of the said stocks or funds in or upon which the said trust moneys should be invested, and the dividends, interest, and produce thereof, upon trust to pay the dividends, interest, and produce thereof when received unto the said *Ann Day*, or empower her to receive the same for and during the term of her natural life, and so and in such manner that the same might not be subject to the control of her then present or any future husband, and so and in such manner that the receipt of her the said *Ann Day*, whether sole or married, might be a good and effectual discharge for the money which therein or thereby should be expressed to be received, and from and after the decease of her the said *Ann Day*, then upon trust to pay the dividends, interest, and produce thereof when received unto the said *John Day*, if then living, or empower him to receive the same during his natural

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life; and if the said *John Day* should die in the lifetime of the said *Ann Day*, then to pay the same to any after-taken husband of the said *Ann Day* that might survive her, or empower him to receive the same for and during the term of his natural life. And from and after the several deceases of the said *Ann Day* and *John Day* and any future husband of her the said *Ann Day*, then upon trust to pay, divide, transfer, or assign the said principal sum of £1000, together with all dividends and interest which might be then due thereon, unto and amongst all and every the child and children of her the said *Ann Day* by her then present or any future husband, and the issue of such child or children, if more than one, in equal shares and proportions, and if but one, then the whole to such one, and to be paid or transferred to such children or child as should be sons or a son at the age of twenty-one years, and to such children or child as should be daughters or a daughter at the age of twenty-one years, or day of marriage, whichever should first happen, the issue of any child or children whose parent or parents should die before his, her, or their share or shares should become payable, to be entitled to the share or shares which his, her, or their parent or parents would have been entitled to if living. But in case the said *Ann Day* should depart this life without leaving any issue as aforesaid by her then present or any future husband, then upon further trust to pay, transfer, or assign the said principal sum of £1000, together with all dividends and interest then due thereon, to such person or persons, and in such manner, proportions, and form as she the said *Ann Day* should, notwithstanding her present or any future coverture, by deed or will appoint, direct, or bequeath.

John Day died in January, 1869. *Ann Day* died on the 29th of August, 1874, without having been married a second time.

There were issue of the marriage of *John* and *Ann Day* seven children, all of whom attained twenty-one. Four of them died in the lifetime of *Ann Day* without issue. Another, *Job Day*, died in the lifetime of *Ann Day*, but left issue one child, the Plaintiff. The other two children survived *Ann Day*.

The action was brought by the only child of *Job Day* against the trustee of the settlement and the legal personal representative of *Job Day*. The Plaintiff claimed administration of the trusts

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of the settlement, a declaration that the Plaintiff was entitled to one-third of the funds subject to the trusts thereof, and consequential relief.

The legal personal representative of *Job Day* demurred to the statement of claim.

Argument.

J. Carr, jun., for the demurrer:—

It is well settled that in such cases as this the word "payable" must be construed "vested": *Haydon* v. *Rose* (1); *Salisbury* v. *Lambe* (2); *Hallifax* v. *Wilson* (3); *Walker* v. *Main* (4). The case of *In re Wilmott's Trusts* (5) may at first sight appear to be the other way, but it will be found that the question there did not relate to vesting but to divesting.

Mulligan, for the Plaintiff, was not called upon.

Judgment.

JESSEL, M.R.:—

I think this demurrer must be overruled. The difficulty arises on the authorities, and not on the instrument; if there were no such cases as *Woodcock* v. *Duke of Dorset* (6) and *Emperor* v. *Rolfe* (7), there could be no doubt what was meant.

The terms of the settlement are these:—[His Lordship read them as stated above, and continued:—] Can there be a doubt, independently of authority, that the words "before his, her, or their share or shares become payable" mean before the period of distribution? One remark which strongly tends to shew this to be the meaning is, that if you read "payable" as "vested," as I am asked to do, then the provision in favour of issue can never take effect as regards daughters, for a daughter cannot have children until she is married, and if she marries her share becomes vested.

However, there is a series of authorities which establishes that, as regards marriage settlements, and also as regards post-nuptial settlements containing a recital of an intention to provide for all

(1) Law Rep. 10 Eq. 224.
(2) 1 Eden, 465.
(3) 16 Ves. 168.
(4) 1 Jac. & W. 1.
(5) Law Rep. 7 Eq. 532.
(6) 3 Bro. C. C. 569.
(7) 1 Ves. Sen. 208.

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the children of a marriage, you are not as a general rule to read the instrument in such a way as to make the provision for a child depend on surviving both parents. But it is laid down, both by Sir *William Grant* in *Howgrave* v. *Cartier* (1) and by Lord *Cottenham* in *Whatford* v. *Moore* (2), that if the settlement clearly and unequivocally makes the right to a provision depend on survivorship, then the rule does not apply. What is "clear" and "unequivocal" is very difficult to say. What is clear to one mind might not be so to another. In the last case on the subject, *Jeyes* v. *Savage* (3), the Court of Appeal differed from Vice-Chancellor *Hall*, and such differences of opinion must always occur in construing ambiguous instruments. But the Lord Justice *James* in that case cites with approval a passage from the judgment of Lord *Cottenham* in *Whatford* v. *Moore*, the concluding words of which are these: "The cases upon this subject turn upon such nice distinctions, and are so little reconcilable, that the only reasonable course is to adopt the rule which has been generally recognised, of leaning in favour of a construction which includes all the children, if the instrument affords fair grounds for doing so; but if not, to give effect to the plain meaning of the words used." I think that is a sensible rule. When you find fair ground for doing so, then, in marriage settlements and post-nuptial settlements containing a recital of an intention to provide for all the children of a particular person or particular persons, you are to lean to that construction which includes them all; but you are not to have recourse to old authorities to overcome the plain meaning of the words used. Here the words used have a plain meaning, and the demurrer must be overruled.

It was then arranged, by consent, that the demurring Defendant should be dismissed from the action, the Plaintiff paying his costs and adding them to his own.

Solicitor: *Samuel Patey.*

(1) 3 V. & B. 79. (2) 3 My. & Cr. 270.
(3) Law Rep. 10 Ch. 555, 563.

Ex parte STEPHENS.

M. R
1876
July 28.

Trade-mark—Word—Trade Marks Registration Act (38 & 39 *Vict. c.* 91), *s.* 10.

A word or distinctive combination of letters is not "a distinctive device, mark, or heading" within the meaning of sect. 10 of the *Trade Marks Registration Act*, 1875 (38 & 39 Vict. c. 91), and cannot be registered as a trade-mark under the Act.

Statement.

THIS was a motion under the *Trade Marks Registration Act*, 1875, that the Registry of Trade Marks might be rectified by the name of *H. C. Stephens* being inserted as the proprietor of a trade-mark comprised of the following letters, printed or otherwise impressed upon paper or other suitable materials in the following distinctive combination: A E I L Y T O N.

The question turned on the construction of sect. 10 of the *Trade Marks Registration Act*, 1875, which provides as follows:—

"For the purposes of this Act, a trade-mark consists of one or more of the following essential particulars, that is to say, a name of an individual or firm, printed, impressed, or woven in some particular and distinctive manner; or a written signature, or copy of a written signature of an individual or firm; or a distinctive device, mark, heading, label, or ticket; and there may be added to any one or more of the said particulars any letters, words, or figures, or combination of letters, words, or figures; also any special and distinctive word or words, or combination of figures or letters used as a trade-mark before the passing of this Act may be registered as such under this Act."

Argument.

Chitty, Q.C., and *W. C. Fooks*, for the applicant:—

The combination of letters which the applicant seeks to have registered as a trade-mark is a "device" within the meaning of sect. 10 of the Act. The word "*Excelsior*" has long been used as a trade-mark, "*Excelsior Soap*;" and that is called a device in the well-known lines of *Longfellow*:

> "The shades of night were falling fast
> As through an Alpine village passed
> A youth who bore 'mid snow and ice
> A banner with the strange device,—
> Excelsior!"

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[JESSEL, M.R.:—I think the device there was the emblem which made the youth go higher and higher.]

The Act nowhere says that there is to be no trade-mark in a word.

Fry, Q.C., and *Rigby*, for the Registrar of Trade Marks.

Judgment.

JESSEL, M.R.:—

The only question I have to decide is, what is the meaning of a trade-mark within the 10th section? According to that section a trade-mark consists of "one or more of the following essential particulars, that is to say, a name of an individual or firm impressed or woven in some particular or distinctive manner." If the argument addressed to me were right, that any word would do, any word would include a distinctive word. The name of a firm is a very distinctive word indeed; therefore that can hardly be so. It then proceeds thus: "or a written signature or copy of a written signature of an individual or firm"—Why should a written signature be specified, if any signature will do?—"or a distinctive device, mark, heading, label, or ticket; and there may be added to any one or more of the said particulars any letters, words, or figures, or combination of letters, words, or figures."

The word "figures" there means numerals; therefore it is this, that you may add to this thing, which is a distinctive device, mark, heading, label, or ticket, letters, words, or figures. Does not that shew that it is not a letter, or word, or figure itself? It may be added, Why does the Act give leave to add? You would never give leave to add words to words. Then it goes on, "Any special and distinctive word or words, or combination of figures or letters used as a trade-mark before the passing of this Act may be registered as such under this Act." That would be struck out of the Act if I were to adopt this construction. Here is a power to register a special and distinctive word, if used before the Act, shewing that it cannot be registered under the Act. Otherwise it would be contravening the well-known rule, that when there is a special affirmative power given which would not be required because there is a general power, it is always read to import the

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negative, and that nothing else can be done, so that the power to register a trade-mark used before the passing of the Act clearly negatives the conclusion that a distinctive word can be used as a trade-mark first used after the passing of the Act. A well-known illustration of that rule may be derived from the Act which gave power to railway companies to borrow on mortgage or bond. It was said that, irrespective of that Act, any corporation might borrow, by common law either on mortgage or otherwise. The answer was, that there being a definite power given, you must import the negative so that the company could only borrow on mortgage or bond. So here, there being power to register a distinctive word used before the Act, it is conclusive to my mind that it cannot be registered if first used after.

Solicitors: *S. Potter; The Solicitor to the Treasury.*

In re AUSTRALIAN DIRECT STEAM NAVIGATION.

M. R.
1876
July 1, 31.

MILLER'S CASE.

Company—Winding-up—Contributory—Original Director—Qualification—Fully paid-up Shares—Companies Act, 1867, *s.* 25.

A limited company was registered on the 6th of November, 1874, with articles of association which provided, amongst other things, that the share qualification of a director should be the holding of twenty-five shares in the company; that *M.* and others should be the first directors of the company; that the first directors (except such of them as should die or vacate their office under the provisions therein contained) should hold office until 1876, and that every director should vacate office by ceasing to be the registered holder of his qualifying number of shares. *M.* attended a meeting of directors on the 10th of November, but resigned office on the 12th, and never afterwards took any part in the affairs of the company. He never applied for any shares, but without his personal knowledge or authority his name was placed on the register for twenty-five shares. The company having been wound up:—

Held, that *M.* by acting as a director contracted to take twenty-five shares from the company, and that he was properly placed on the register, and must be placed on the list of contributories.

The same articles of association provided that in consideration of the services of the first directors each of them should receive and be registered as

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the holder of twenty-five fully paid-up shares, which were to be forfeited in the event of his dying, or ceasing to be a director by his own act or default:—

Held, on a rehearing, that *M.'s* contract was to take fully paid-up shares; and that his name must be removed from the list of contributories.

Statement.

THIS was an application by the official liquidator of the *Australian Direct Steam Navigation Company, Limited*, that Captain *David Miller* might be settled on the list of contributories as the holder of twenty-six shares.

The company was registered on the 6th of November, 1874. Captain *Miller* signed the memorandum of association for one share, as to which his liability was undisputed. He also signed the articles of association, which contained the following clauses:—

"25. The share qualification of a director shall consist in his being the registered holder of twenty-five shares or stock to the amount of £500 at the least in the company. Admiral *Frederic Augustus Buchanan Craufurd*, *Thomas Backhouse*, Commander *John Powles Cheyne*, *William Bruce Dick*, Captain *David Miller*, Captain *John Robertson*, and *Henry G. Trend* shall be the first and present directors of the company. The board may, at any time previous to the ordinary general meeting in the year 1875, appoint duly qualified persons as additional directors, so that the total number of directors shall not at any one time, without the authority of a general meeting, exceed twelve.

"26. The directors named in article 25, and the additional directors (if any) elected under the powers conferred on the board by that article (except such of them as shall die or vacate their offices under any of the provisions of these presents) shall continue to be directors until the ordinary meeting to be held in the year 1876, and thenceforth until they respectively retire pursuant to articles 27, 28, and 29.

"27. At the ordinary meeting in the year 1877, and at the ordinary meeting in every subsequent year, two directors shall retire from office, and the meeting shall elect qualified shareholders to supply their places."

"32. Every director shall vacate his office on ceasing to be the registered holder of his qualifying number of shares, or becoming bankrupt, or suspending payment, or compounding with his credi-

tors, or being found lunatic, or (if the board shall so resolve) ceasing for six successive months to attend the meetings of the board; but until an entry of such vacating of office shall be entered upon the minutes of the board his acts as a director shall be valid and effectual."

Statement.

On the 10th of November, 1874, *Miller* attended a meeting of directors. On the 12th of November, 1874, he sent to the company a letter resigning his office of director on the ground that he would be unable to attend to the affairs of the company, and on the 16th of November, 1874, he received a letter from the secretary accepting the resignation. From the date of his resignation he ceased to take any part in the affairs of the company.

The company commenced to be wound up in 1875. At the commencement of the winding-up Captain *Miller* was entered on the register as the holder of twenty-six shares; but he never applied for any shares, nor were any ever allotted to him: nor did he authorize or know of his name having been placed on the register.

Argument.

Everitt and *Clement Lloyd*, for the official liquidator:—

The clauses as to the qualification of directors clearly apply to the original directors. Captain *Miller* signed the articles of association and acted as director; he was therefore properly placed on the register of shareholders as the holder of twenty-five shares in addition to that for which he signed the memorandum: *Karuth's Case* (1); *Brown's Case* (2); and he must be a contributory in respect of these shares.

Chitty, Q.C., and *Somers Lewis*, for Captain *Miller*:—

We say that the original directors were not required to be holders of twenty-five shares. The language of the 25th section as to qualification is future, and applies only to future directors, and therefore *Lord Claud Hamilton's Case* (3) applies. But even if the original directors were to be qualified, the cases cited on the other side shew that such a director is entitled to a reasonable

(1) Law Rep. 20 Eq. 506. (2) Law Rep. 9 Ch. 102.
(3) Law Rep. 8 Ch. 548.

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time to acquire his qualification; here a reasonable time has not elapsed, for the company was only registered on the 6th of November, and Captain *Miller* resigned office on the 12th.

Judgment.

JESSEL, M.R.:—

12 Ch D 203

I regret that I feel myself compelled to put Captain *Miller's* name on the list of contributories. I regret it because I think if he had fully understood his position he would not have attended a meeting of directors, for that is really the ground upon which I do put him on the list; but I have only to administer the law as it stands. I take it, if I am once satisfied that by the articles of association his qualification was twenty-five shares, and if I am also satisfied that he acted as a director, and has been registered as a shareholder, that I have no option but to hold that he authorized that registration, not in fact, but in law, and that he must be treated as a contributory for twenty-five shares.

The first question is, does the qualification apply to the original directors? I must say, following in this respect at least two decided cases, that the words are sufficient for that purpose. The 25th clause is, "The share qualification of a director shall consist in his being the registered holder of twenty-five shares, or stock to the amount of £500 at the least in the company." There is no exception there of the first directors. The words are "of a director," that is, of any director. The words, therefore, of the clause are against him. Then, after appointing the first directors, the clause goes on to say that the board may at any time previous to the ordinary general meeting in the year 1875 appoint duly qualified persons as additional directors; and as far as that goes, therefore, the qualification applies to the first directors. Then the 26th article provides that the directors named in article 25, and the additional directors (if any), "except such of them as shall die or vacate their offices under any of the provisions of these presents," shall continue in office until 1876. The word "them" must refer to the first directors as well as the others; we see, therefore, that the original directors may vacate their office. Then the 32nd article is, "Every director" (these words are beyond question) "shall vacate his office on ceasing to be the registered holder of his qualifying number of shares or

becoming bankrupt or suspending payment, or compounding with his creditors, or being found lunatic, or (if the board shall so resolve) ceasing for six successive months to attend the meetings of the board." In my opinion every one of these qualifications applies to the original directors; plainly the latter portions of the clause apply, and I think it is equally plain that the ceasing to hold the required number of shares applies also.

That being so, I take it to be settled by *Brown's Case* (1) that where the qualification is not necessary at the time of election (though generally the qualification is indispensable as a preliminary to election, and the election is void if the man has no qualification), but where it is not indispensable to election, the director has a reasonable time for acquiring the qualification, either from the company or anybody else, but he must acquire it before he acts. Although he may abstain from acting for a reasonable time, still if he abstains from acting for a very long time he is liable; he is equally liable if he acts—the time ceases to run when he acts. Again, I take it to be also settled in *Brown's Case* that if in the ordinary course of the business of the company he is registered in their books as a shareholder, the agreement which the man enters into by becoming a director to take the qualification is a sufficient authority for the registration, and therefore he is a duly registered shareholder whether he knew of the registration or not.

I will read one or two passages from *Brown's Case* to shew that the propositions which I have mentioned are laid down in that case. Lord *Selborne* says (2): "The true result to be drawn from those authorities appears to be, that the fact of a man accepting the place of director for which the possession of a certain number of shares is a necessary qualification is most material in determining whether he shall or shall not be permitted to repudiate as unauthorized by himself the registration of shares which, in the ordinary course of the business of the company, have actually been placed in his name, and which were needful for his qualification." So that he plainly there considered that though the director was not aware of the registration, and did not authorize it himself, still that the taking of the office or the acceptance of the

(1) Law Rep. 9 Ch. 102. (2) Law Rep. 9 Ch. 107, 109.

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office was a sufficient authority for putting his name on the list. The second point, that becoming a director involves an agreement to take the shares, is laid down in the next judgment, that of Lord Justice *James*, who says, after referring to his judgment in *Leeke's Case* (1): "I intended merely to say that becoming a director involved an agreement to have the qualifying shares;" that is, where a qualification is incidental to the office, the becoming a director involves an agreement to have the qualifying shares. The third point, as to what time the director has, is laid down by Lord Justice *Mellish*, who says this: "The expression that he must be qualified by holding so many shares does not oblige him to take shares from the company, but he may obtain the shares in any other legal mode by which shares may be acquired; and I think, strictly to comply with the articles of association, it would be sufficient that he should have acquired the shares before he acts as a director. If that were not so, and if the meaning of the articles of association was that a person must have the shares before he is qualified to be a director, the consequence would be that the election of Mr. *Brown* as a director would be wholly void. According to the ordinary understanding of mankind, it would be quite sufficient if a person acquired shares before he acted as a director; and there can hardly be any doubt that if a proposal was made to any man to become a director in the company, and if he assented to the proposal, and purchased the necessary number of shares in the market, or got a friend to transfer them to him before he acted, that would be quite sufficient qualification, and it would be impossible to infer, under the circumstances, that he had agreed to take unpaid shares and pay the calls upon them." Then he winds up by saying: "I do not mean to say that if a person assented to becoming a director, and had shares allotted to him of the number for his qualification, and for a considerable time went on and acted as a director, then you might not infer that he had agreed to accept the shares."

The only question, then, is, did Captain *Miller* act? He clearly acted, for he was present at a meeting on the 10th of November, at which important business was transacted, and he did not desire to retire till two days afterwards; and he gave as a reason for

(1) Law Rep. 6 Ch. 469.

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Judgment.

retiring that he had other business to attend to. He has acted, and is within all the authorities.

The only remaining question is, how many shares he ought to be put on the list for. The qualification is twenty-five shares. It is true he is registered for twenty-six, but he says that he never did take them, and there is no evidence that he did. According to Lord *Selborne's* decision, the authority to register was only for the number needful to qualify him, and consequently the authority being only for the twenty-five shares, his name ought to be on the list for twenty-five shares only, and not for twenty-six. The one he has taken will of course go to make up the twenty-five.

Rehearing.

July 31. The case was reheard in consequence of the attention of the Court not having been called to the following clause in the articles of association :—

"38. In consideration of the services of the directors nominated by Article No. 25 each of such directors shall receive and be registered the holder of twenty-five fully paid-up shares of the company, but certificates of such shares shall not be issued, and the directors shall not be entitled to any further remuneration (except as hereinafter provided by Article No. 40) until the shareholders have been paid a dividend of not less than 10 per cent. per annum free of income tax, or until the expiration of three years from the incorporation of the company, whichever shall first happen; after which such further annual remuneration for each year shall (if any) be such sum as shall from time to time be determined by general meetings, and shall be divided as the board shall determine. In the event of any director dying or ceasing to be a director by reason or in consequence of his own act or default prior to the company having declared such dividend or the expiration of three years as aforesaid, he shall forfeit the above-mentioned twenty-five shares, which shall afterwards be held at the disposal of the board, who shall determine the amount of remuneration to be paid to such retiring director in lieu of such shares, according to the time he has served, and the amount so determined shall be final and conclusive. No share for which any director may subscribe to the memorandum of association shall

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be deemed to be a part of the twenty-five shares mentioned in this article."

Argument.

Chitty, Q.C. (*Somers Lewis* with him), for Captain *Miller*, submitted that the 38th clause of the articles of association clearly shewed that the shares to be taken by the original directors under clause 25 were to be fully paid up, and that Captain *Miller* could not be held to one part of the bargain without having equally the benefit of the other part.

Everitt (*E. ~~B. Cooper~~* with him), for the liquidator, submitted that the 38th clause merely provided a special mode of remunerating the first directors, and did not affect or qualify the absolute requirements of the 25th and 32nd clauses; and that the articles of association did not constitute a contract in writing within the meaning of sect. 25 of the *Companies Act*, 1867.

Judgment.

JESSEL, M.R.:—

The point now raised is quite clear; the only wonder is that it was missed before.

The reason I put Captain *Miller* on the list last time is plain. The bargain he made under the articles of association was that he should become a director, and that the qualification of his directorship should be the holding twenty-five shares. I held that he was bound by that bargain; but in fact when you come to look at another portion of the same instrument, you find that the bargain was that he should have twenty-five shares as fully paid up. That part of the bargain is contained in the 38th clause, and is the only ground on which Captain *Miller* can be released from liability. The language of the clause is perfectly clear, and those who allege that Captain *Miller* is bound by one part of the bargain cannot escape from the other part of it. If they wish to fix him by the contract he has entered into, they must take the contract as they find it; that is to say, with this clause in it. This clause provides a qualification exactly in accordance with the 25th clause. It says that each director is to have twenty-five fully paid-up shares. Those shares may be forfeited if the director resigns or goes away. Captain *Miller* did resign, and his shares were forfeited accordingly.

It appears to me that there was no pretence for putting Captain *Miller* on the list of contributories, and his name must be taken off for all the shares except one. As regards the costs, I think the right course is to make no order, except that the official liquidator will take his costs out of the estate.

M. R. 1876 MILLER'S CASE.

Solicitors: *Lowless, Nelson, & Co.; R. H. Wilkins.*

In re BOROUGH OF HACKNEY NEWSPAPER COMPANY.

M. R. 1876 *July* 15, 31.

Company—Mortgage to Director—Non-registration—Realization of Security—Subsequent Winding-up—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 43.

A company mortgaged chattels to two of the directors, who furnished the secretary with the necessary particulars for entering it in the register of mortgages, and directed him to register it, but he omitted to do so. The directors put in force the powers in their mortgage and realized their security; and subsequently the company was ordered to be wound up:—

Held, that as the directors had not "knowingly and wilfully authorized or permitted the omission" of the entry of the mortgage on the register, and had realized their security before the commencement of the winding-up, the liquidator could not compel them to refund the proceeds of the security.

Statement.

THIS was an application by the official liquidator of the *Borough of Hackney Newspaper Company, Limited*, that an indenture of mortgage, dated the 18th of December, 1874, and made between the company of the one part, and *James Hatton Theobald* and *James Rodger Best* of the other part, might be set aside.

The company was registered in July, 1874. The first directors were eight in number, and *James Hatton Theobald* and *James Rodger Best* were two of them. In December, 1874, the company were indebted to *Theobald* and *Best* in the sum of £1746 4*s.* advanced by them for the purpose of enabling the company to carry on its business, and they had applied to the company for security. At a board meeting held on the 14th of December, 1874, the draft of the mortgage in question was read and approved of, and the deed was executed at a subsequent meeting on the 18th. By it a newspaper published by the company, and the copyright therein, and the fixed and moveable machinery, printing presses, types, furniture and effects, which then, or at any time

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thereafter, might be fixed or fastened to or in or upon the printing offices then occupied by the company, or any premises which might at any time thereafter be occupied by the company, were assigned to *Theobald* and *Best*, subject to a proviso for redemption if the company should pay the sum of £1746 4*s*., and any other sums due from the company to them, together with interest at 15 per cent., forthwith after they should have left a notice at the company's office requiring payment, with power for them, in case of default of payment, to take possession of and sell the chattels and premises thereof assigned.

On the 6th of March, 1875, *Theobald* and *Best* served a notice requiring immediate payment of the sum of £2000 due on the security. Default was made in payment; and they, on the same day, took possession of the property comprised in the mortgage. The property was sold on the 21st of May, 1875, and the net proceeds of sale amounted to £340.

The winding-up order was made on a creditor's petition presented on the 26th of June, 1875.

The validity of the mortgage was impeached on several grounds; and, amongst others, on the ground that it was not registered in accordance with sect. 43 of the *Companies Act*, 1862. With reference to this, it appeared that on the day when the draft mortgage was approved by the board the solicitor of Messrs. *Theobald* and *Best* told the secretary of the company that the mortgage must be registered, and supplied him with the particulars necessary for making the entries, and that Messrs. *Theobald* and *Best* afterwards pressed the secretary and managing director to register the mortgage, but they refused to do so unless they were furnished with a copy of the deed, which, however, was never sent to them.

Argument.

Miller, Q.C., and *W. W. Cooper*, for the official liquidator, cited *Ex parte Valpy & Chaplin* (1); *In re Wynn Hall Coal Company* (2).

Chitty, Q.C., and *Sangster Green*, for the company:—

First: The creditors put in force their security and realized the mortgaged property before the winding-up commenced; and there

(1) Law Rep. 7 Ch. 289. (2) Law Rep. 10 Eq. 515.

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is no decision which compels the Court to hold that the mortgagees, though directors, must, under those circumstances, refund, simply because their mortgage was not registered.

Secondly: The mortgage deed is not made void by the 43rd section of the *Companies Act*, 1862. That section only inflicts a penalty in the event of a knowing or wilful omission to register. Here the omission was not knowing or wilful; for the mortgagees pressed the managing director and secretary to register it, and supplied the necessary particulars; but they refused on a ground which cannot be supported.

Miller, in reply, urged that every director was as liable as the secretary. The mortgagees knew perfectly well that the deed was not registered; it was their business to see that it was done.

Judgment.

JESSEL, M.R.:—

The 43rd section of the *Companies Act*, 1862, directs a register to be kept of all mortgages, and it imposes a penalty if the register is not kept, but it does not make void an unregistered mortgage. It has, however, been decided that if an officer whose duty it is to make the entry does not cause it to be made, he not only incurs the statutory penalty, but that as a further penalty for his neglect of duty he loses the benefit of his mortgage. It has further been decided that a solicitor is an officer of the company for this purpose. These are decisions of the Court of Appeal, and I am bound to follow them, although it is difficult to see on what principle those cases have been so decided, and although I might not myself have come to the same conclusion in the first instance.

What, then, must a mortgagee do to incur such a penalty? If he is to be punished, it must be for doing something wrong; in the language of the section, he must "knowingly and wilfully authorize or permit the omission" of the entry on the register. Here the mortgagees, who were two of the directors, directed the secretary to enter the mortgage on the register; the secretary did not do it. If, then, these directors are the persons whose duty it was to make the entry, they have directed it to be made: if it be not their duty, then they cannot have authorized or permitted the

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omission. It appears to me that they have done all they could; and I cannot say that under this enactment, which is a most penal one, they could have incurred a penalty; and I have the authority of the Court of Appeal for saying that the omission to make the entry does not of itself make their mortgage void.

Then the second point is this, that the mortgagees are not claiming the benefit of the mortgage in the winding-up as they were in the decided cases. Before the winding-up commenced they put the mortgage in force and realized their security. It is difficult to see why they should not avail themselves of their rights in this way. Suppose the mortgage had been realized ten years before the winding-up, could the liquidator call on the mortgagees to repay what they had realized, and say that the whole transaction was void? There is no authority to that effect, and I cannot so hold.

The other questions raised by the summons (as to which a report is not called for) were then gone into, and ultimately the summons was dismissed.

Solicitors: *Walter, Moojen, & Son; Benham & Tindell.*

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[1875 P. 171.]

Will—Construction—"Family."

The primary meaning of the word "family" in a will is "children."

A testator directed the interest arising from all his real and personal property to be paid to his wife during her life, and after her decease to be equally divided amongst all his family that should be then living when they should attain the age of twenty-one years. At the date of his will he had seven children living, some over and others under twenty-one, and some married, with children:—

Held, that under the word "family" children alone could take.

Statement.

THIS was a suit for the administration of the estate of *William Pigg*, a beerhouse keeper in *Ipswich*, who made his will (dated the 10th of May, 1851) in the following terms:—

"In disposing of my earthly goods in which it has pleased the

Statement.

Almighty to bless me with, I give and bequeath in trust to Mr. *Wm. F. Codd* and *Henry Bevan* the younger, both of *St. Margaret's, Ipswich, Suffolk,* for the whole and sole bennefit of my wife *Hannah Pigg* during her natural life, not being subject to any husband or husbands that she may hereafter intermarry with, the interest arising from all my real and personal property of whatever discription or nature, whatsoever or weresoever, after paying all my just debts and funeral expenses, then all the remaning. interest arising from such property to be paid half-yearly to my said wife, *Hannah Pigg,* during her life. And after her decease, then to be equally divided amongst all my said family that shall be then living when they shall obtain the age of twenty-one years."

The testator died on the 21st of December, 1855, leaving his widow and seven children him surviving. The widow died in August, 1875. Of the seven children of the testator three survived his widow; two died in her lifetime without having been married; another died in her lifetime leaving a widow (who survived the testator's widow) but no children; and the seventh died in her lifetime leaving a widow and children who survived the testator's widow. Some of the testator's children were married at the date of his will and had children then living; some of his children had then attained twenty-one, others were then infants.

The question was, who were entitled under the words "my said family."

Argument.

Lemon, for the three children of the testator who survived the widow, submitted that by "family" the testator must be taken to mean his children: *Barnes* v. *Patch* (1).

Colt, Rendall, and *Romer,* for grandchildren, contended that all the lineal descendants of the testator were to be included under the term "family," citing *Cruwys* v. *Colman* (2); *Gregory* v. *Smith* (3); *Williams* v. *Williams* (4); *Snow* v. *Teed* (5).

Phear, for the widow and the sons, submitted that the daughters-

(1) 8 Ves. 604.
(2) 9 Ibid. 319.
(3) 9 Hare, 708.
(4) 1 Sim. (N.S.) 358.
(5) Law Rep. 9 Eq. 622.

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in-law of the testator ought to be included, and cited *In re Terry's Will* (1).

JESSEL, M.R.:—

I have in this case to consider the will of a shopkeeper, who at the date of his will had a wife and seven children living; some of the children were twenty-one, others under that age; and he had at least one child married who had children. Under these circumstances he makes his will thus:—[His Lordship read it.] The question is, who are meant by the word "family": it being contended on the one hand that it means "children," and on the other hand that it must include all the descendants of the testator.

The word "family" has various meanings. In one sense it means the whole household, including servants, and, perhaps, lodgers. In another sense it means everybody descended from a common stock, that is to say, all blood relations; and it may, perhaps, include the husbands and wives of such persons. In the sense I have just mentioned, the family of *A.* includes *A.* himself; *A.* must be a member of his own family. In a third sense, the word includes children only; thus when a man speaks of his wife and family, he means his wife and children.

Now, every word which has more than one meaning has a primary meaning; and if it has a primary meaning, you want a context to find another. What, then, is the primary meaning of "family"? It is "children"; that is clear upon the authorities which have been cited; and, independently of them, I should have come to the same conclusion. I hold, therefore, that the children of the testator can alone take under the words "my said family."

Solicitors: *Aldridge & Thorn,* agents for *Jackaman & Sons, Ipswich.*

(1) 19 Beav. 580.

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[1876 F. 102]

Aug. 2, 3.

Succession Duty—Bonâ fide Sale—Reversionary Charge—Succession Duty Act (16 & 17 *Vict. c.* 51), *ss.* 2, 7, 17.

A conveyance or assignment by way of *bonâ fide* sale does not create a succession within the meaning of the *Succession Duty Act* (16 & 17 Vict. c. 51).

Where the purchaser of a reversionary life interest in settled property had contracted to sell it to *D.*, the tenant for life in possession, in consideration of a sum of money paid down and a further sum payable on the death of *D.*, secured by a charge on the reversion:—

Held, that there was no "succession" created within the meaning of sect. 2 of the Act, and that no duty would be payable on the death of *D.* in respect of the said charge.

The effect of the exceptions in sects. 7 and 17 of the Act, considered.

Statement

THIS was an action by a vendor for specific performance, the sole question being whether succession duty was payable on a reversionary charge created under the following circumstances:—

In the year 1867 the family estates at *Powderham Castle*, in *Devonshire*, called in the pleadings "the *Devon* estates," stood limited to the use of the Earl of *Devon* for life, with remainder (subject to a joint power of appointment vested in the Earl of *Devon* and Lord *Courtenay*) to the use of his son, Lord *Courtenay*, for life, with remainders over.

Lord *Courtenay* subsequently mortgaged his life interest in remainder to *W. H. Fryer*, who foreclosed the mortgage and died, having by his will devised all his interest to the Plaintiff, Mrs. *Fryer*.

In June, 1876, the Earl of *Devon* contracted with the Plaintiff for the purchase from her of the interest formerly belonging to Lord *Courtenay* in the *Devon* estates in consideration of an immediate payment of £15,000, and of a reversionary sum of £52,500, to be charged upon the *Devon* estates by means of the exercise of the said joint power of appointment, and to be paid to the Plaintiff at the expiration of six months from the death of the Earl of *Devon*, with a proviso that if the interest for the said sum should be regularly paid the principal should not be called in till three years from the death of the Earl.

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In pursuance of the contract a mortgage of the said estates was executed by the Earl of *Devon* and Lord *Courtenay*, who in exercise of their joint power of appointment charged the said estates with payment of the sum provided by the contract.

By a memorandum of agreement dated the 17th of May, 1876, and made between the Plaintiff and the Defendants, as trustees of the *Reversionary Interest Society*, the Plaintiff agreed to sell to the Defendants, free from all incumbrances, her reversionary interest in the sum of £52,500, subject to the condition that the same should be payable without deduction for succession duty, and the title was accepted, subject to the question whether such duty was payable.

The Defendants contended that, in the event of the purchase being carried into effect, succession duty would, by reason of the payment of the said sum depending upon the death of the Earl of *Devon*, be payable by the purchasers thereon when the same sum became payable.

Part of the purchase-money, £30,800, had been paid to the Plaintiff under an agreement with the Defendants that it should be returned in the event of its being held that succession duty would be payable if the purchase were carried into effect.

Argument

Chitty, Q.C., and *Rigby*, for the Plaintiff:—

We submit that succession duty would not be payable on the reversionary charge of £52,500 by the Act. The transaction in respect of which it is alleged that duty will become payable was a *bonâ fide* contract for sale, and by sect. 17 of the Act "no bond or contract made by any person *bonâ fide* for valuable consideration in money or money's worth, for the payment of money or money's worth after the death of any other person, shall create the relation of predecessor and successor between the person making such bond or contract and the person to or with whom the same shall be made."

Here the Plaintiff contracted to sell Lord *Courtenay's* life estate for money or money's worth.

In *Floyer* v. *Bankes* (1) Lord *Westbury* observed: "To explain the intention and effect of the 17th section, it is desirable to make

(1) 3 D. J. & S. 306, 311.

a few remarks on the general object and design of the *Succession Duty Act*. In framing the Act, the word "succession" was adopted for the purpose of denoting any property passing upon death from one person to another by virtue of any gift or descent, or of any contract not being a *bonâ fide* contract of purchase. Money or property, the right to receive or possess which might arise upon death under a contract made *bonâ fide* in return for other money or property, was not as between the contracting parties to be treated as a succession." He further observed, in order to shew the operation of the section, "If the owner of a freehold estate in fee simple contracts to sell it for a sum of money, subject to and reserving a life interest in himself, the relation of predecessor and successor will not arise between the vendor and the purchaser."

[They referred also to *Lord Braybrooke* v. *Attorney-General* (1) and *Attorney-General* v. *Sibthorp* (2).]

Davey, Q.C., for the Defendants:—

This incumbrance is not one to which Lord *Courtenay* would be entitled as successor under sect. 34 of the Act, because Lord *Courtenay's* own estate is a life estate, and he may die in Lord *Devon's* lifetime, in which case the next tenant in tail, who has not concurred in making the incumbrance, would be the successor.

The 15th section provides that where "any succession shall, before the successor shall have become entitled thereto or to the income thereof in possession, have become vested by alienation or by any title not conferring a new succession in any other person, then the duty payable in respect thereof shall be paid at the same rate and time as the same would have been payable if no such alienation had been made or derivative title created."

In this case, the next person in the entail after Lord *Courtenay* takes a new succession under the resettlement; he may therefore take a derivative interest by alienation, though by a new title, and he would take as successor from the disposition made by Lord *Courtenay*. He would then be the successor within the meaning of the 34th section, and this incumbrance would be one that is "created or incurred." Assuming that it was "created or incurred" by Lord *Courtenay* within the meaning of the 15th

(1) 9 H. L. C. 150. (2) 3 H. & N. 424.

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section, the successor, whoever he might be, would be entitled to an allowance for it. He would then only pay on the legal estate, after deducting the amount of the incumbrance, and those who would become entitled to his charge or incumbrance on the death of Lord *Devon* would then be liable to succession duty, unless they are exempted by some other section of the Act.

In the case of *In re Peyton* (1) it was held (Baron *Bramwell* dissenting) that an incumbrance on the fee created by a joint power vested in a former tenant for life and tenant in tail was an incumbrance created or incurred by the tenant in tail, who succeeded his father as tenant for life, under a resettlement within the meaning of sect. 34. All the Judges considered that the incumbrance would be allowed to the person coming into the entail. That case is, I submit, undistinguishable from the present. Here we are dealing with a prospective case. If Lord *Courtenay* should die in his father's lifetime, or even if he should survive his father, and the incumbrance is not paid off during his lifetime, in either case the next successor would be allowed the amount of the incumbrance, and the succession duty would fall on the incumbrance.

According to the principle of *Attorney-General* v. *Lord Eustace Cecil* (2), the creation of a charge under a joint power by a tenant for life and tenant in tail of a sum of money on the death of the father, constitutes a new succession, and, that being so, there is nothing in the Act which would relieve the successors in this case from payment of the succession duty. The case of *Floyer* v. *Bankes* (3), referred to on the other side, does not apply, because that only decided that "money or money's worth," in the 17th section, did not include the consideration of marriage.

Where a sum of money made payable by any one on his own death is purchased, a succession is created in favour of the purchaser. It cannot be said that all *bonâ fide* sales are excluded from the Act: the words "not being a *bonâ fide* sale" in sect. 7 follow the words "any disposition of property," and they would not be expressly excluded in sect. 7 if they might not be included as "dispositions" in sect. 2.

The next question is, whether sect. 17 applies. That section

(1) 7 H. & N. 265. (2) Law Rep. 5 Ex. 263.
(3) 3 D. J. & S. 306.

provides that "no bond or contract made by any person *bonâ fide* for valuable consideration in money or money's worth for the payment of money or money's worth, after the death of any other person, shall create the relation of predecessor and successor." This means a personal contract for the payment of money. In the present case, if there was a contract at all within the meaning of the section, the only person who contracted with Mrs. *Fryer* for the purchase of the interest was Lord *Devon;* he contracted to obtain Lord *Courtenay's* concurrence, and the conveyance was made to trustees by his direction. But the words "after the death of any other person" must mean any person other than the contractor. Here the contract was for the payment of a sum of money on Lord *Devon's* death, therefore the contract (if any) was not within the section. If the transaction is regarded not as a contract but a charge, not taking effect by virtue of any contract, but by virtue of the appointment made out of Lord *Courtenay's* interest,—in that view likewise the section does not apply.

In the case of *Attorney-General* v. *Yelverton* (1), where, under a settlement, *W. C.* was entitled to an estate for life, with remainder to his wife and his first and other son in tail male, with remainder to *G.* for life, with remainder to her first and other sons in tail male, and *W. C.* and *F. C.* executed a disentailing deed and resettled the estates, and by another deed *F. C.*, for valuable consideration, charged the estates with £20,000, payable to *W. C.* twelve months from the day when the limitations to the tenant for life and the remainders over should fail, it was held that the contract for this charge for the benefit of the tenant for life was within the exception of the 17th section; but it was also held that another deed, executed by *W. C.*, giving part of this sum of £20,000 thus charged to his daughters, created a succession, although it was not existing property in him to which he was entitled at the death of another person.

In *Oldfield* v. *Preston* (2), where one member of a tontine contracted with the other members that on his death, if he died first, the other members whose nominees survived should have his share of the fund,—it was held that, on the division of the capital, no succession duty was payable, because it came within sect. 17 of

(1) 7 H. & N. 306. (2) 3 D. F. & J. 398.

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the Act, but Lord Justice *Turner* observed (1) that, if it did not fall within that section, he was not satisfied that the duty would not have been payable.

In this case I contend that the contract comes within sect. 2 of the Act, and that the exemptions in sects. 7 and 17 are exceptions which prove the rule.

Radcliffe, on the same side.

Judgment.

JESSEL, M.R.:—

The case, no doubt, is one of the very greatest possible importance, because it calls for the decision, for the first time, on a question which must constantly arise, and which, on a consideration of the Act, evidently must be determined on a general view of its meaning, and not on any nice criticism of any particular section; that mode of construction has been adopted as regards this Act by the House of Lords in *Lord Saltoun* v. *Lord Advocate* (2).

The real question I have to decide is this, Does a conveyance or assignment by way of *bonâ fide* sale come within the provisions of the Act of Parliament?

The facts are not very complicated, but, as it appears to me, they raise that question, and that question only. The substantial facts are these:—

Lord *Devon* was tenant for life of the *Powderham Castle* estates. His son, Lord *Courtenay*, was tenant for life in remainder. Both tenancies for life were preceded by a joint power of appointment exerciseable by Lord *Devon* and Lord *Courtenay*. Lord *Courtenay's* estate had become by assignment—that is, by virtue of a mortgage and foreclosure decree—the absolute property of a Mr. *Fryer*, and passed under his will at his death to Mrs. *Fryer*, who was therefore the absolute owner of the reversionary life interest of Lord *Courtenay*, and by virtue of that absolute ownership could have prevented any exercise of the joint power by Lord *Devon* and Lord *Courtenay* without her assent. In that position of matters she contracted with Lord *Devon* to sell to him the reversionary life estate of Lord *Courtenay* in consideration of a sum of £52,500,

(1) 3 D. F. & J. 408. (2) 3 Macq. 659.

a reversionary sum to be paid after Lord *Devon's* death and to be charged on the estate, and of a sum of £15,000 money down. That, therefore, was a simple sale for money down and money payable on his decease, the latter sum of money to be secured by a charge on the estate. That was money's worth. It is a pure and simple sale. The money paid down was of course money paid, and the money to be paid at a future time was to be secured by a sort of charge or mortgage. It is a very common case where you sell for a future payment that you secure that money in some way or another. The mode of securing that money, whether on the estate itself or on any other estate, seems to be quite immaterial, considering the nature of the transaction. It was a simple sale of the life estate for money part paid and part to be secured in a particular way.

In pursuance of that contract Lord *Devon* and Lord *Courtenay*, in exercise of the joint power, charged the estate with the £52,500, payable on the death of Lord *Devon*, and Mrs. *Fryer* having contracted to sell, that £52,500 is charged in reversion on the estate.

The purchaser objects to the title on the ground that, on the death of Lord *Devon*, succession duty will be payable on the £52,500. As I said before, that raises the simple question whether, on a sale out and out, for that is what it was as regards the charge, succession duty is payable at all?

First, let us see what the Act is for. It is an Act for granting to Her Majesty duties on succession to property, and for altering certain provisions of the Act charging duties on legacies and shares of personal estates. The succession duties are provided by the 10th section to be payable at different rates, according to the relationship of the successor to the predecessor. A lineal descendant pays £1 per cent.; other successors of the degrees of relationship mentioned pay up to £6 per cent.; and where there is any other degree of consanguinity, or the successor is a stranger in blood to the predecessor, then £10 per cent. is paid.

Looking, therefore, at the Act as a whole, it is, in fact, an Act to grant a duty on successions to property by persons succeeding to estates by gratuitous title. That is its meaning. It assumes that a man gets something on the death of the prior owner, either

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by way of settlement or by way of gift or descent, and thereby gets a profit. The only exception that I can find to that on principle is that a marriage consideration is treated as if it were a gratuitous title for this purpose. That kind of contract which is made on marriage to provide for the issue is treated as succession. That seems the general notion of the thing.

It is opposed to that notion to imagine that a purchaser for value who has paid the full value of the property is to pay the duty besides. He has already bought it, and he gets nothing by the death of or falling in of the life. On the death of the person, or the falling in of the life, the property comes into possession. It is bought and paid for, probably, according to the terms, at its full value. It would be an unfair thing to make him pay a tax to the Crown, and it would be very singular to make him pay a tax, graduated according to his relationship to the vendor; so that, if a man bought by auction who happened to be the son of the vendor, he should pay £1 per cent., and if a stranger bought he should pay £10 per cent.

If we look at the whole scope of the Act, and its meaning generally, it does appear to me, unless I find very distinct words in the Act to say it applied to an ordinary case of purchase out and out,—that is not a transfer of existing successions (when of course there are provisions that the purchaser shall be in the same position as the vendor)—that I should be going against what I conceive to be the purview of the whole of the Act, to say that a conveyance or assignment on *bonâ fide* sale was within it at all. Therefore I approach the Act with the impression that it is not intended to impose a new tax on alienations.

The next question is, what are the words of the Act? because, whatever one's views may be of the general meaning of an Act of Parliament, of course one must have regard to the words. Now, the words in which it is sought to include this property are the words in the 2nd section of the Act. If it is not included within that, it is not included in any other section. It is: "Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately

or after any interval, either certain or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution, a 'succession.'"

It is a very odd thing that those words do not say "in possession." That is what the Act means—"By reason whereof any person has or shall become beneficially entitled to any property *in possession*"—but it does not say so. A man becomes beneficially entitled to property in one sense undoubtedly before he gets into possession. But the Act obviously means possession; and it says, "The term 'successor' shall denote the person so entitled, and the term 'predecessor' shall denote a settlor, disposer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived."

What is the meaning of those latter words? How can you say that the interest of the purchaser is derived from the vendor? He does not derive it from the vendor. He derives it from his own money which bought the property. It seems to me a straining of language to say that a purchaser for value derives his interest from the vendor. You would not, if you were talking of a horse which you had bought for money, say you derived your interest in that horse from the horse-dealer—you would say you bought it with your money. That is your title to the horse. Your title as purchaser is the title of a man who has derived his interest from the money in his breeches pocket. And I should say it would be a most extraordinary use of language to say the man who bought the horse derived his interest in the horse from the horse-dealer. If he did derive it from the horse-dealer, why not from the horse-breeder who sold it to the horse-dealer? I do not see how far you are to go if this sort of derivation is the meaning of it. The man who bought it for the money did not derive it in that sense at all from anything but his money. And, in my opinion, the fair meaning of those words at the end of the 2nd section cannot be strained so as to include a *bonâ fide*

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purchase for value. Therefore I think, both on the fair construction of the wording of the Act, and a fair regard to the purview of the Act, it does not include an assignment for value in money or money's worth.

Now, that being my opinion, I shall decide that the title was good. But the next thing to consider is whether there are any decisions the other way; because, whatever might be my opinion about the Act of Parliament, if there are decisions in conflict with it I might be bound by those decisions.

In the first place, there is a series of decisions which seem to confirm the view I take of the Act, that is to say, cases where a disposition was made by the purchaser on a purchase. The question arose, who was the predecessor? and it was held that if a man bought for valuable consideration, either money or money's worth, and, instead of taking a conveyance to himself direct, took a conveyance by way of settlement on himself and others in succession, that he was a settlor, that is, that the title was derived from the purchaser, and not from the vendor. I may cite on this question the case of *In re Jenkinson* (1), which was followed by the *Attorney-General* v. *Baker* (2). I may say in both those cases the consideration was money's worth, rather than actual money paid down; but they do, notwithstanding that, confirm the doctrine that the derivation of title is not from the vendor, but from the purchaser; in other words, that the vendor can in no sense be predecessor. The only other case which at all bears on the subject is the case of *Floyer* v. *Bankes* (3), which is a dictum of Lord *Westbury*. He says this: "In framing the Act the word 'succession' was adopted for the purpose of denoting any property passing upon death from one person to another by virtue of any gift or descent, or of any contract not being a *bonâ fide* contract of purchase." That dictum, therefore, is exactly in accordance with the view I take. "Money or property, the right to receive or possess which might arise upon death, under a contract made *bonâ fide* in return for other money or property, was not as between the contracting parties to be treated as a succession, but it was not intended to except property arising upon death under contracts for valuable consideration generally."

(1) 24 Beav. 64. (2) 4 H. & N. 19. (3) 3 D. J. & S. 306, 311.

Then he goes on to deal with the 17th section, which I admit raises some difficulty as to the construction.

Therefore, the decisions, as far as they have gone, do not militate against the proposition which I think is correct, but rather favour it, though none of the decisions are precisely in point.

Then arguments were raised which I must advert to for a moment on the 17th section of the Act. It is said, if that is the correct view of the Act, what is the 17th section put in for at all? It begins: "No policy of insurance on the life of any person shall create the relation of predecessor and successor between the insurers and the assured, or between the insurers and any assignee of the assured." No doubt you might have a gratuitous policy of insurance, but I do not think it is fair to the Legislature to imagine or suppose that they contemplated any such case. I must read the words "policy of insurance" there to mean a policy of insurance effected in the ordinary way in consideration of a premium or premiums. If that is so, that is a contract, no doubt, for money. It is a purchase of a reversionary sum in consideration of a present payment of money, or, as is generally the case, on the payment of an annuity during the life of the person insuring. It is clearly a contract which could not be fairly described, as I read it, as a disposition of property at all, because a mere covenant to pay money is not a disposition of property in the ordinary sense. The insurance company does not die, and therefore a covenant to pay money on the death of some other person is a mere contract to pay money. It is no disposition of the property of the insurance company or of any body else that I have found out. It does not appear to me, therefore, to be within the words of the first part of the 2nd section any more than it is within the second part of the 2nd section. Why was it excepted? Well, I do not know. I find it quite impossible to answer the question. It probably was excepted to quiet the fears of persons interested in insurance companies *ex cautelâ*. But, if I am right, it was not required, as not being within either branch of the 2nd section.

The next exception is: "And no bond or contract made by any person *bonâ fide* for valuable consideration for money or money's worth, for the payment of money or money's worth after the death of any other person, shall create the relation of predecessor and

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successor." The same observation applies to that. A bond or contract for the payment of money is not a disposition of property. It might have been (as was suggested by Mr. *Davey*) in one sense if it had been the death of the person himself, because it gives a right against his assets; but this is on the death of any other person, therefore it remains a bond or contract to the end.

Here, again, I cannot find anything within the first part or the second part of the 2nd section. All I can say is, it must have been put in by way of precaution, as I hold the policy of insurance to be. Nor can I find that either of the things excepted are within the provision from which they are expressed to be excepted.

Then it goes on: "But any disposition or devolution of the moneys payable under such policy, bond, or contract, if otherwise such as in itself to create a succession within the provisions of the Act, shall be deemed to confer a succession." These words are not wanted either. I admit that the first part is not wanted, but the persons who argue that the first part was wanted must shew that the second part was wanted. Nothing can be clearer. A settlement of money payable is a settlement of property within the ordinary meaning of the term, and in fact there has been an express decision that a policy of insurance itself was property though the liability to pay the money may not be a disposition of property. So that it is for those who say the first part was wanted to say the second part was wanted. But I think, in construing an Act of Parliament, when we find provisions put in by way of precaution not absolutely required, it is by no means necessary to infer that, because these provisions are put in, therefore everything not included in the exception is to be included in the general provision which we find in the Act of Parliament, and which by itself would not include the thing excepted. It appears to me that the argument on the 17th section does not assist the case.

The only other argument was an argument on the 7th and 15th sections.

The 7th section is as follows:—"Where any disposition of property not being a *bonâ fide* sale, and not conferring an interest expectant on death on the person in whose favour the same shall be made, shall be accompanied by the reservation or assurance of or contract for any benefit to the grantor, or any other person for

any term of life or for any period ascertainable only by reference to death, such disposition shall be deemed to confer at the time appointed for the determination of such benefit an increase of beneficial interest in such property, as a succession equal in annual value to the yearly amount or yearly value of the benefit so reserved, assured, or contracted for, on the person in whose favour such disposition shall be made."

The object is plain enough: it was to prevent a man conveying the fee, reserving himself a life interest. But it excepts a *bonâ fide* sale, and of course the argument was, if all *bonâ fide* sales were excepted, why are the words "not being a *bonâ fide* sale" put in? I do not know. I am quite unable to say why. But I again cannot read those words being put into that section, "not being a *bonâ fide* sale," anything more than that it was intended to shew that any attempt of this kind, any attempt gratuitously to reserve a life interest to the original owner, should be deemed to create a succession. I agree that it was not absolutely necessary, perhaps, to except a *bonâ fide* sale. It was more formal draughtsmanship to say so, and nothing can be derived in the shape of argument from that section.

Now, on the 15th section it seems to me that if there is any argument at all it is in favour of the view I take. The object and meaning of the 15th section is this—that where you buy an existing succession you shall pay the original duty, that is, the duty that would have been paid by the successor if there had been no purchase. But it seems to me to shew that the framers of the Act never intended to look at the relationship between purchaser and vendor, because that would have made the rate depend on his consanguinity, whereas the rate does not; it is still to depend on the consanguinity of the original owner of the succession; in other words, they do not consider that the mere fact of a purchase is to create a new succession or alter the thing at all. It is not a very strong argument either way, but as far as it goes, I think it is in favour of the view I adopt.

On the whole, I am of opinion that succession duty is not payable on this *bonâ fide* sale, and consequently the title is good.

Solicitors for Plaintiff: *Kingsford, Dorman, & Kingsford.*
Solicitors for Defendant: *Radcliffe, Cator, & Martineau.*

M. R.
1876
Aug. 3.

ROGERS *v.* JONES.

[1876 R. 5.]

Will—Election against Estate of Person put to Election.

A testator, entitled under a settlement to a life interest in certain cottages to which his wife became absolutely entitled on his death, purported to devise them to her for life, with remainder to *A.*, who, without knowing of the settlement, sold his supposed reversionary interest to the Plaintiff. The testator's widow, who took other benefits under the will, subsequently sold the cottages to a purchaser without notice of the devise. On the widow's death the Plaintiff claimed compensation against her estate:—

Held, that the widow had elected to take the cottages against the will, and that *A.* was entitled to compensation for the loss he had sustained in respect of their value at the widow's death, out of her estate to an extent not exceeding the amount of her other benefits under the will.

Statement.

By a marriage settlement dated the 11th of November, 1833, certain messuages and hereditaments (including six cottages in *Rhos Street*, *Ruthin*) were settled to the use of *William Williams* for life, with remainder to the use of his wife, *Jane Williams*, for life, with remainder to the use of the first and other sons of *W. Williams* in tail, and for default of such issue to the use of his first and other daughters in tail, and for default of such issue to the use of the heirs of the survivor of them the said *W. Williams* and *Jane Williams*.

William Williams, by his will made in 1860, gave to his said wife, *Jane Williams*, all his real estate during her life, and after her decease he purported to devise "all those six cottages situate in *Rhos Street*" (being part of the property included in the said settlement) to his nephew, *Thomas Rogers*, his heirs and assigns.

The testator died in 1860 without issue, and his widow, *Jane Williams*, became absolutely entitled under the settlement to the property therein comprised.

In 1864 *Thomas Rogers*, not being aware of the settlement, sold and conveyed to the Plaintiff his supposed reversionary interest under the testator's will in the said cottages.

In 1875 *Jane Williams* died, having appointed the Defendants, *W. D. Jones* and *R. P. Davies*, her executors.

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After the death of *Jane Williams* the Plaintiff first ascertained that she had in 1872 sold the six cottages in *Rhos Street* to a purchaser for value without notice of the devise in the testator's will.

Statement.

The Plaintiff now brought his action against the executors of *Jane Williams*, and submitted that he was entitled to be indemnified out of her estate in respect of the loss sustained by him in consequence of the sale of the cottages by the Defendant, or that such sale was an election by her to take the cottages against the will of the testator, and that, consequently, the Plaintiff, as the person injured by such election, was entitled to receive compensation for such injury out of the other benefits derived by *Jane Williams* under the will of the testator, for the loss occasioned to the Plaintiff by such election, and to have the amount of such benefits ascertained and paid out of her estate.

Argument.

Chitty, Q.C., and *Romer*, for the Plaintiff.

Cookson, Q.C., and *Bradford*, for the Defendant:—

In this case no case of election arose; and even if the widow might have been put to her election in her lifetime, there is no authority for such a claim being made, after so long a time, against the estate of a deceased person.

Judgment

JESSEL, M.R.:—

The testator in this case gave his real estate to his wife for her life, with remainder as to six cottages, which did not belong to him, to his nephew *Thomas Rogers*. At the time of the devise the testator's only interest in these cottages was a life estate under the settlement, with a contingent remainder if he survived his wife.

Under these circumstances a case of election arises. The doctrine of election is this—that if a person whose property a testator affects to give away takes other benefits under the same will, and at the same time elects to keep his own property, he must make compensation to the person affected by his election to an extent not exceeding the benefits he receives. In this case the widow, having elected to take against the will, was bound to make compensation to the Plaintiff to the extent of the benefits she received

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under the will. Therefore, in her lifetime she might to this extent have been thus made liable.

But it is said that the Plaintiff's right to be indemnified is lost by the death of the widow. Why? I see no principle upon which her death should exonerate her estate. The liability of her estate must now be ascertained, and there must be an inquiry as to the amount of the benefits which the widow received in her lifetime under the will, and as to the compensation to which the Plaintiff is entitled in respect of the loss he has sustained by not getting possession of the six cottages at the death of the widow, so far as such loss does not exceed her benefits under the will.

The pleadings to be amended by making *T. Rogers* co-Plaintiff.

Solicitors for Plaintiff: *C. C. Ellis & Co.*

Solicitor for Defendant: *F. W. Adams,* agent for *L. Adams, Ruthin.*

M. R. 1876 *Aug.* 7.

In re IVES. BAILEY *v.* HOLMES.

[1875 B. 4a.]

Settled Estates Act (19 & 20 *Vict. c.* 120) *s.* 17—*Trust for Sale—Consent by Beneficiaries to Sale.*

4 Ch D. 880
5 Ch D. 453.

Where property was vested in a trustee upon trust after the death of the tenant for life to sell and divide the proceeds among numerous persons who would become absolutely entitled, with power to the trustee to give receipts, —on a petition by the tenant for life, under the *Settled Estates Act*, for a sale of the property:—

Held, that under sect. 17 of the Act the consent of all the beneficiaries was necessary.

Statement.

THIS was a petition in the matter of the *Leases and Sales of Settled Estates Act* by a tenant for life under a will, that an agreement for the sale of part of the devised estate might be carried into effect.

William Ives, by his will, devised the property in question to his wife for life, and after her decease to *James Irving* for life, and after his decease to *Harriet Bailey* for life, and after the decease of the

survivor of them his said wife, *James Irving*, and *Harriet Bailey*, to *Joseph Holmes*, upon trust to sell and divide the proceeds in equal sixth parts among the persons and in manner in the will mentioned.

The testator's wife and *James Irving* were now dead. The number of persons interested in the proceeds of the sale of the said property was twenty-five.

Statement.

The petition was presented by *Harriet Bailey*, the present tenant for life of the property, and it had only been served on *Holmes*, the trustee.

The question was whether the concurrence of the persons beneficially interested in the property after the death of the tenant for life was required under sect. 17 of the *Leases and Sales of Settled Estates Act*.

Argument.

Chitty, Q.C., and *Russell Roberts*, for the Petitioner, submitted that the concurrence of the persons entitled to the proceeds of the sale of the property on the Petitioner's death was not required. In a similar case, *In re Pott's Estate* (1), Lord *Romilly* held that it was unnecessary, and that had been followed by Vice-Chancellor *Malins* in the case of *In re Strutt's Trusts* (2).

Rigby (*amicus curiæ*) said that in another case, *In re Greenall's Estate*, Lord *Romilly* had refused to follow *In re Pott's Estate*.

Bradford, for the trustee.

Judgment.

JESSEL, M.R.:—

The section of the Act appears to me a very plain one. With regard to the decisions referred to, I do not consider that I am bound to follow recent decisions of Courts of concurrent jurisdiction when I am clear that they are wrong, and when I am clear that they contravene the provisions of Acts of Parliament.

What is the meaning of the words of the Act? The 17th section, after providing for the consent required in the case of a tenant in tail, proceeds thus:—"And in every other case the parties to concur or consent shall be all the persons in existence having any beneficial estate or interest under or by virtue of the settlement,

(1) Law Rep. 16 Eq. 631, n. (2) Law Rep. 16 Eq. 629.

M. R. 1876 ~~ *In re* IVES. — BAILEY *v.* HOLMES. — Judgment. —

and also all trustees having any estate or interest on behalf of any unborn child." Consider the words employed: "Any beneficial estate or interest." Why was the word "interest" used? Because if there was a trust for sale it might be said that the persons beneficially interested had no estate, and yet they would have an interest.

So, again, a person entitled to a portion charged on an estate, or to shares in the proceeds of the sale, would have no "estate," although he would have an "interest." I do not know how wider terms could have been used. When there is an unborn child, then the statute provides that his trustees shall consent for him, clearly implying that they are not to consent for a born child.

Then it is said that, if a trustee has power to give receipts, he has a beneficial interest in the property, and in *Eyre* v. *Saunders* (1), a case which, speaking with great respect, I do not understand, it was held that the power to give receipts put a trustee in the same position as if he were a beneficial owner. But the insertion of that power shews that he is only a trustee, and being so, he has not a beneficial interest in the property.

In the case of *In re Pott's Estate* (2), the tenant for life was still living, and Mr. *Kekewich*, who appeared in support of the petition, said that when the trust for sale was immediate it had been held that the concurrence of the persons interested in the proceeds of the sale was not necessary, but it had been suggested that it might be different there, as the tenant for life was still alive, and the trust for sale, and power to give receipts, did not come into operation till her death. He cited *Eyre* v. *Saunders* and *Grey* v. *Jenkins* (3), where it was held that trustees with an immediate power of sale might join in a sale which would bind all persons claiming under them. After these cases had been cited, the late Master of the Rolls is reported to have expressed the opinion that the concurrence of the parties beneficially interested was not necessary; but I am informed by Mr. *Rigby* that Lord *Romilly* subsequently declined to follow his own decision.

The case of *In re Strutt's Trusts* (4) was a very different one. There the gift was to a contingent class, which, as the Vice-

(1) 4 Jur. (N.S.) 830.
(2) Law Rep. 16 Eq. 631, n.
(3) 26 Beav. 351.
(4) Law Rep. 16 Eq. 629.

Chancellor observed, could not be ascertained, and therefore falling within the case of *Beioley* v. *Carter* (1). But then the Vice-Chancellor proceeded to cite *In re Pott's Estate* (2), and to give other reasons for his judgment with which I cannot agree.

It appears to me that the plain words of the Act compel me, in this case, to require the concurrence of all the persons beneficially interested in the proceeds of the sale.

Solicitors: *Rooks, Kenrick, & Co.*, agents for *J. M. Richardson, Much Hadham.*

(1) Law Rep. 4 Ch. 230. (2) Law Rep. 16 Eq. 631, n.

V.-C. M.

1876

March 16.

COOKE *v.* CHILCOTT.

Covenant running with Land—Positive Contracts—Performance in alieno solo —Mandatory Injunction — Purchaser bound by Notice — Admission of Liability.

5 Ch D. 351.
3 Ch D 326
5 C.L.D. 115
9 Q.B.D. 404-5
40 L.T. 408, 410-1,
2 C.L.D. 219, 220

A purchaser of a piece of land with a well or spring upon it covenanted with the vendor, who retained land adjoining intended to be disposed of for building-sites, to erect a pump and reservoir, and to supply water from the well to all houses built on the vendor's land:—

Held, 1, that both the benefit and the burden of the covenant ran with the land, and that the case was not within the second resolution in *Spencer's Case* (1), but if not, a sub-purchaser with notice of the covenant was bound by it:

Held, 2, that, though the covenant was not one of which the Court would decree specific performance directly as being for the construction of works which the Court could not superintend, it could be enforced indirectly by an injunction restraining the Defendant from allowing the work to remain unperformed.

Statement.

THIS was a motion for an injunction to restrain the Defendant from keeping or leaving two houses belonging to the Plaintiffs, or either of them, or any other houses that might be thereafter built upon a piece of land belonging to the Plaintiffs, without a full and ample supply of good, clear, and wholesome spring water, contrary to a covenant contained in an indenture of the 29th of September, 1849.

By a deed of the 25th of July, 1848, a piece of land at *Woodhill*, in the parish of *Portishead*, *Somerset*, was conveyed by the Corporation of *Bristol* to the ordinary dower uses in favour of *James Pullin Hinton*, and the deed contained certain building covenants.

By a deed of the 29th of September, 1849, *James Pullin Hinton* conveyed to *Benjamin Farmer*, and his heirs, a house and premises, part of the piece of land comprised in the deed of the 25th of July, 1848, being No. 6, together with the well or spring of water and pump-house thereon at *Woodhill*.

By a deed of covenant of the same date, also made between *Hinton* of the one part, and *Farmer* of the other part, after reciting the deed of even date, and that *Hinton* was possessed of other land

(1) 5 Rep. 16 a.; 1 Sm. L. C. 60.

at *Woodhill*, coloured pink on a plan on the now stating indenture (being the remainder of the land comprised in the indenture of the 25th of July, 1848), and that *Farmer* was about to erect a steam-engine, and dig and make a large and capacious tank upon some parts of the said premises, for the purpose of placing the said engine for pumping water from the aforesaid well adjoining the house No. 6 at *Woodhill* aforesaid, which engine was to pump from the said well, or any other well of *Farmer*, his heirs, appointees, and assigns, the quantity of water thereinafter mentioned for not only the supply of all and every the messuages or dwelling-houses then already erected upon the said hereditaments and premises, but of all and every other messuages or dwelling-houses thereafter to be erected upon the said hereditaments and premises, and to convey the same water by proper pipes into each and every of such messuages or dwelling-houses, not exceeding one hogshead, or sixty-three gallons, per day, for each and every such messuages or dwelling-houses, upon being paid the annual sum of £2 as thereinafter mentioned, It was witnessed that *Hinton* thereby covenanted not to grant or release any of the land or premises belonging to him at *Woodhill* in any way whatsoever for the purpose of making any well or tank for the use of any house then belonging to him there, or for any house thereafter to be erected on the said land so belonging to him, and that in all grants and conveyances of the said premises he would insert a covenant by any purchaser that such purchaser should be bound to have and take and be supplied with water from the said well, or any well belonging to *Farmer*, his heirs or assigns, so long as *Farmer* should continue to supply at least sixty-three gallons of clear spring water daily for the use of each house, subject to the payment of the said rent of £2 by equal half-yearly payments on the 25th of March and 29th of September in each year; and after a covenant by *Hinton* for payment of the rent for each house until he should have conveyed such house to other parties, the now stating indenture contained the following covenant:—

"And the said *Benjamin Farmer*, for himself, his heirs, executors, administrators, appointees, and assigns, doth hereby covenant, promise, and agree to and with the said *James Pullin Hinton*, his heirs, appointees, or assigns, that he the said *Benjamin Farmer*,

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his heirs, executors, administrators, appointees, and assigns, shall and will erect, finish, and complete the steam-engine, and finish and complete the tank or tanks, and from time to time, and at all times for ever hereafter, find and provide a full and ample supply of good, clear, and wholesome spring water as aforesaid, for not only the houses already built, but for all and every messuage, tenement, or dwelling-house and offices hereafter to be built upon any part of the said hereditaments and premises. Provided always, and these presents are upon the express condition, that if the said well or spring shall at any time hereafter fail or not produce a sufficient supply of such spring water as aforesaid for all the messuages, tenements, or dwelling-houses and offices as aforesaid, or that any part of the machinery or pipes shall be out of repair, then that the said *Benjamin Farmer*, his heirs, appointees, executors, administrators, or assigns, will, without any delay, find and supply spring water of an equal quality from some other source, so that the said several messuages, tenements, or dwelling-houses shall not be kept without such supply of spring water, the owners or occupiers of each of such houses paying to the said *Benjamin Farmer*, his heirs, executors, or administrators, the said rent or sum of £2 per annum for each house half-yearly, upon the days and times aforesaid. But it is hereby expressly stipulated and agreed, that if the said *Benjamin Farmer*, his heirs, executors, administrators, or assigns, shall at any time hereafter fail, neglect, or refuse to supply all and every or either of the messuages, tenements, or dwelling-houses already erected and built, or hereafter to be erected and built upon any part of the said hereditaments and premises with a supply of such spring water as aforesaid (but subject to the proviso aforesaid), that then and in such case it shall and may be lawful to and for the said *James Pullin Hinton*, his heirs, executors, administrators, appointees, or assigns, or any tenant or tenants, or occupier or occupiers, of any of such messuages, tenements or dwelling-houses and offices as he the said *Benjamin Farmer*, his heirs, appointees, executors, administrators, or assigns, shall fail, neglect, or refuse to supply as aforesaid, and shall not thenceforth be liable to take water from or be supplied by the said *Benjamin Farmer*, his heirs, executors, administrators, appointees, or assigns, nor to pay the said sum of £2 per annum, nor any other

sums of money, to the said *Benjamin Farmer*, his heirs, executors, administrators, appointees, or assigns, for any such particular messuage or dwelling-house. But it is hereby expressly stipulated and agreed that neither the said *James Pullin Hinton*, his heirs, executors, or administrators, nor any person or persons lawfully claiming under him or them, shall supply any other person or persons with spring water except he the said *Benjamin Farmer*, his heirs, appointees, executors, administrators, or assigns shall fail, neglect, or refuse so to do as aforesaid."

James Pullin Hinton died on the 6th of September, 1857, and by a deed of the 23rd of January, 1871, part of the land comprised in the deed of the 25th of July, 1848, was conveyed by *Hinton's* devisees to one *Gallo*, who covenanted that all houses which might at any time be built upon the piece of land thereby conveyed should be supplied with water by *Benjamin Farmer*, his heirs or assigns, so long as *Farmer*, his heirs or assigns, should continue to each of such houses sixty-three gallons per diem of clear spring water in manner provided for by the said indenture of the 29th of September, 1849; and that the sum of £2 each should be paid to *Farmer*, his heirs or assigns, in respect of such houses so supplied.

By a deed of the 25th of July, 1871, *Gallo* and the other parties interested conveyed to the Plaintiffs in fee simple a portion of the land comprised in the deed of the 23rd of January, 1871.

Shortly after the 29th of September, 1849, *Farmer* erected a steam-engine and pump, and constructed a large tank or reservoir, upon the premises purchased by him, for the purpose of pumping and storing or receiving water from the well or spring.

The Defendant, by deed of the 27th of August, 1857, purchased from the mortgagees of *Farmer* the land, with the well and tank. He purchased with full notice of the covenant by *Farmer*, and he was now the owner of the premises, No. 6, at *Woodhill*, and the well or spring, pump, tank, or reservoir, and steam-engine.

At the date of the deeds of the 29th of September, 1849, several houses had been erected on parts of the land belonging to

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Hinton adjacent to the parts afterwards purchased by the Plaintiffs, and since that date a considerable number of other houses had been erected in a similar position.

These last-mentioned houses had been continuously supplied with water from the well or tank, first by *Farmer* and afterwards by the Defendant, to the present time.

The Plaintiffs had, since the date of their purchase, erected two dwelling-houses on the land purchased by them. In April, 1875, a Mr. *Cogan*, who had arranged with the Plaintiffs to take one of their houses on a two-years' lease, applied to the Defendant to perform his covenant in the deed of the 29th of September, 1849, and lay on a supply of spring water from the well or spring. The Defendant admitted his liability under the covenant, but the Plaintiffs, as a matter of friendly concession, in order to enable *Cogan* to take possession immediately, accepted, as a temporary arrangement, a proposal that a cask should be placed at the house and filled daily by the Defendant's workmen. *Cogan* then took possession, and the Plaintiffs placed a cask outside the house capable of containing twenty gallons of water, and the Defendant's workmen continued till the early part of January, 1876, to fill it daily, when he suddenly, and without assigning any reason, discontinued the supply, and declined to accept the rent for the water supply when tendered by the Plaintiffs.

The Plaintiffs now moved upon affidavit shewing the above facts.

Argument.

Glasse, Q.C., and *G. I. F. Cooke*, for the Plaintiffs:—

The Defendant has notice of this covenant, and therefore he is bound by it, even if it does not run with the land: *Keppell* v. *Bailey* (1); *Tulk* v. *Moxhay* (2); *Daniel* v. *Stepney* (3); *Parker* v. *Whyte* (4); *Whatman* v. *Gibson* (5). There is, however, nothing in the nature of such a covenant which prevents it running with the land: *Morland* v. *Cook* (6). The persons through whom the Defendant claims have received the consideration for this supply of water. The case is therefore one in which the Court will, if

(1) 2 My. & K. 517.
(2) 2 Ph. 774.
(3) Law Rep. 7 Ex. 327; Ibid. 9 Ex. 185.
(4) 1 H. & M. 167.
(5) 9 Sim. 196.
(6) Law Rep. 6 Eq. 252.

possible, relieve the Plaintiffs: *Storer* v. *Great Western Railway Company* (1).

Bristowe, Q.C., and *Bush*, for the Defendant:—

What is now asked is in effect a mandatory injunction. The covenant is one which cannot run with the land. In the first place, it is a covenant to do something *in alieno solo*. In order to carry it out it would be necessary to lay down pipes on the land of the Plaintiffs. The case, therefore, comes exactly within the second resolution in *Spencer's Case* (2). The rule is, that if a covenant affects the particular land sold, it runs with the land. But if it affects land not sold, and is a positive covenant to do something, it does not bind the assignees. In *Tulk* v. *Moxhay* (3) the land to which the covenant attached belonged to the covenantor.

[MALINS, V.C.:—Assuming that the covenant does not run with the land, is not the Defendant still bound by notice?]

If that were so, there is a second objection to the covenant, which is, that it is one of which the Court, not being able to superintend its execution, will not decree specific performance: *Powell Duffryn Steam Coal Company* v. *Taff Vale Railway Company* (4); and therefore will not interfere by injunction.

[*Glasse*:—*Storer* v. *Great Western Railway Company* has been followed recently in *Wilson* v. *Furness Railway Company* (5).]

The second resolution in *Spencer's Case* has never been modified, and it covers this case completely. The Master of the Rolls refused to grant an injunction in *Enfield Local Board* v. *Harrison*, which came before the Master of the Rolls on the 25th of March, 1874, and was very similar to this case. The Court will also take into consideration the expense to which the Defendant would be put by being required to perform this covenant.

Glasse, in reply, was stopped.

(1) 2 Y. & C. Ch. 48.
(2) 5 Rep. 16 a.; 1 Sm. L. C. 60.
(3) 2 Ph. 774.
(4) Law Rep. 9 Ch. 331.
(5) Law Rep. 9 Eq. 28.

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MALINS, V.C., after referring to the facts, continued:—

That this is a covenant which the Court ought to support, if possible, is evident. The defence is rested partly on the ground of the expense which the performance of the covenant would involve. But I cannot listen to a defence of that kind, because the Defendant bought the property with express notice of the covenant by which he is bound to supply water to these houses, and it was for him to consider, when he bought it, whether the covenant did or not involve too great a burden. But the Plaintiffs' right is resisted principally on two grounds. First, it is said that the covenant does not run with the land. Now, there is no dispute as to what acts the performance of the covenant requires. The well has been sunk, and the Defendant is bound to maintain and keep in repair a steam-engine to be used for supplying the houses with water from it.

The Defendant also bought with notice of the obligation, and cannot take the property without performing the obligation attached to it. It is, therefore, immaterial whether the covenant runs with the land, but I think it does run with the land.

This is the case of two persons claiming title under grants from the same vendor, by which one piece of land became bound for the benefit of the other, and the question is whether the covenant can be enforced against the person who contracted to bear the burden. That as between the original parties, it could have been enforced, I cannot entertain a doubt; and I think that it is a covenant which runs with the land for all time. I entertain no doubt that as between contiguous owners, both being sub-purchasers under the same vendor, they take subject to the burden.

I quite agree with what was said by Lord *Cottenham* in *Tulk* v. *Moxhay* (1), "That this Court has jurisdiction to enforce a contract between the owner of land and his neighbour purchasing a part of it, that the latter shall either use or abstain from using the land purchased in a particular way, is what I never knew disputed. Here there is no question about the contract. The owner of certain houses in a square sells the land adjoining, with a covenant from the purchaser not to use it for any other purpose than as

(1) 2 Ph. 777.

a square garden; and it is now contended, not that the vendee could violate that contract, but that he might sell the piece of land, and that the purchaser from him may violate it without this Court having any power to interfere." Now, as I pointed out to Mr. *Bristowe*, if the covenant is not binding on the ground that it does not run with the land, the consequence would be that, though these contiguous owners have relied on having it performed, the Defendant might from this hour refuse to supply a single gallon of water, and thus every house which has been erected in the expectation that this covenant would be performed might be at once deprived of water. It would be perfectly monstrous that such a defence should be allowed. In my opinion, therefore, the covenant runs with the land, but it is immaterial whether it does or not, because the Defendant took with notice of the obligation.

Then, suppose that the covenant does not run with the land, Mr. *Bristowe* and Mr. *Bush* have referred to *Spencer's Case* (1) as an authority for holding that it cannot in that case be enforced. There is no occasion to dispute that case. But later decisions have carried the law beyond *Spencer's Case*. There are many instances in which covenants not running with the land have been held binding. It is a very common thing for a covenant to be binding if the purchaser has had notice, and not otherwise. *Daniel* v. *Stepney* (2) may be taken as an instance of this. There the Court of Exchequer decided that a particular covenant could not be enforced. The Plaintiffs in appealing had the wisdom to retain counsel conversant with that branch of the law, and the decision was reversed, the Court of Appeal deciding unanimously that the covenant in question was obligatory whether it ran with the land or not.

I do not think it necessary to go into all the cases which were cited. But I think that when a contract is entered into for the benefit of contiguous landowners, and one is bound by it, and the other entitled to the benefit of it, the covenant binds him for ever, and also runs with the land. But it is equally clear that he is bound by taking the land with notice of the covenant.

(1) 5 Rep. 16 a.; 1 Sm. L. C. 60.
(2) Law Rep. 7 Ex. 327; Ibid. 9 Ex. 185.

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Then it is said that the Court cannot decree specific performance of this covenant. It is very true that there are many covenants of which the Court does decree specific performance. The case of the *Enfield Local Board* v. *Harrison*, mentioned by Mr. *Bush*, is an instance of such a covenant. It involved the performance of expensive works, and appears to me as clear a case as ever came before a Court of Equity, because of the rule that the Court will not superintend the performance of such works. It was a clear case for damages if a breach of the contract had been committed, but not for specific performance.

Now there are cases such as *Storer* v. *Great Western Railway Company* (1), where there was a contract as to making a road. In these cases the Court grants an injunction, which indirectly obtains the object of the performance of the work required. This is not a new principle. The same course was taken by Lord *Eldon* in *Lane* v. *Newdigate* (2), where he granted an injunction restraining the Defendant from keeping the banks of a canal and locks out of repair.

This case is one seeking for the performance of works which are required to last a long time, and therefore an injunction expressly ordering the work to be done cannot be granted. But the Defendant is subject to the obligation of laying down certain pipes and supplying water to the houses of the Plaintiffs, and those pipes he must lay down and that water he must supply; and though I cannot directly make him lay down the pipes, I can and will make an order by means of which he will be guilty of contempt of Court if he does not lay them and provide the supply of water. I think I am now in a situation to make such an order, and the injunction will accordingly go in the terms of the notice of motion.

April 5. The Defendant appealed, and on this day the case came on before the Court of Appeal. It was then suggested that, pending the suit, some temporary arrangement should be made, and by consent the injunction was dissolved on an undertaking by the Defendant to give the temporary accommodation.

(1) 2 Y. & C. Ch. 48. (2) 10 Ves. 192.

June 15. The Plaintiffs having filed a statement of claim setting out the above facts, and also alleging that the Plaintiffs had lost their tenant in consequence of the failure in the supply of water, and that neither house could be let without a supply of water, the Defendant demurred. The demurrer now came on for hearing. His Lordship then considering that the demurrer only raised the same points which he had decided on the motion for the injunction, overruled it without further argument.

Aug. 2. The Defendant having appealed against the order overruling the demurrer, the appeal now came on to be heard before the Court of Appeal. The attention of their Lordships having been drawn to the fact that by the statement of claim it was alleged that the Defendant had admitted his liability on the covenant, the Court of Appeal affirmed the decision of the Vice-Chancellor without going into the points argued before him on the motion.

Solicitors: *Clarke, Woodcock, & Ryland; Warry, Robins, & Burges.*

JULL *v.* JACOBS.

[1873 J. 85.]

Will—Construction—Remainder—Meaning restricted by Context—Void Life Estate—Intestacy—Donee attesting Witness—Acceleration.

A testator, after disposing specifically of most of his property, enumerated certain funds out of which he directed that his debts, funeral and testamentary expenses, should be paid, and added: "The remainder to be equally divided to my surviving children." The frame of the will left it doubtful whether these words were intended to apply generally or only to the residue of the particular funds:—

Held, that, considering the general frame of the will, only what was left of the particular funds passed.

Gift to the testator's daughter of real and personal estate "during her lifetime, and after her decease the property to be equally divided between her children on their becoming of age":—

Held, that, as regarded the real estate, the gift to the children was strictly a remainder, and that the construction as to the personalty followed the same

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rule as the realty; and, therefore, that, the gift to the daughter being void on account of her having attested the will, the gift to the children was accelerated, and took effect immediately:

Held, also, that the remainder to the daughter's children created vested interests.

Festing v. *Allen* (1) disapproved.

Statement.

GEORGE JULL, who died on the 3rd of August, 1873, and had living at the time of his death a son, *Robert Stiles Jull*, and two daughters, Mrs. *Louisa Hephzibah Jacobs*, the wife of *Charles Arthur Jacobs*, and *Annie Maria Jull*, and a granddaughter who was the only child of a deceased son, made his will, dated the 9th of November, 1872, by which he gave the bulk of his property specifically amongst his three children.

The will was not prepared by any skilled person, and was divided into paragraphs.

It began as follows:—

"This is the last will and testament of me, *George Jull*, of *Lynwood Tyndall's Park, Clifton, Bristol.*

"First I give, devise, and bequeath unto my eldest daughter, *Annie Maria Jull*, the house, *Lynwood Park*, as above named."

Then followed an enumeration of other property also given to this daughter, and another clause commenced,

"I give, devise, and bequeath unto my daughter *Louisa Hephzibah Jacobs* during her lifetime, and after her decease the property to be equally divided between her children on their becoming of age."

The property so given was then enumerated, and a clause followed making other specific gifts to *Robert Stiles Jull*, after which came the following clause:—

"I also desire that all my just debts, funeral and testamentary expenses, to (*sic*) be paid by my executors, *Charles Arthur Jacobs* and *Annie Maria Jull*, from money or promissory (*sic*) notes or bills due to (*sic*) at the time of my decease at the bank and elsewhere, The remainder to be equally divided to my surviving children."

There was no other residuary clause.

(1) 12 M. & W. 279; 5 Hare, 573.

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The will was attested by the two executors so named, and the gifts to the daughters were consequently void under the 15th section of the *Wills Act*.

The suit now came on for hearing on further consideration, and some questions of construction were raised. One of these was whether the general residue or only the remainder of the things specified passed under the words "The remainder to be equally divided to my surviving children." In order to explain this the original will was produced.

Statement.

There was a comma at the end of the word "elsewhere," which came to the end of a line, and the word "The" began a line with a capital. But each clause in the will began with a capital letter, whether commencing a fresh line or not, and from the fact of the word "elsewhere" coming to the end of the line it was doubtful whether the succeeding words were or not intended as the beginning of a fresh paragraph.

Argument.

J. Pearson, Q.C., and *J. T. Humphry*, for the Plaintiff *Annie Maria Jull*; and *Glasse*, Q.C., and *Collins*, for the infant grandchild, who was the heir-at-law of the testator:—

This clause must be taken in connection with the preceding, and as only referring to the remainder of the things specified: *Lewis* v. *Nokes* (before the House of Lords, May 19, 1876); *In the Goods of Ludlow* (1).

Whitehorne, for *Robert Stiles Jull*:—

This point is really covered by *Attree* v. *Attree* (2).

Judgment.

MALINS, V.C.:—

I think that, as a general rule, where a will disposes of a variety of property belonging to a testator, and winds up with a gift of the remainder or the residue, it is treated as a gift of the general residue; but each case must depend upon the particular circumstances and the framing of the will. It seems to me that this will shews an intention on the part of the testator to dispose of a particular part of his property in each particular paragraph, and, after disposing of the bulk of his property in that way, he adds that now

(1) 1 Sw. & Tr. 29. (2) Law Rep. 11 Eq. 280.

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in question. [His Lordship then read the paragraph, and continued:—]

Now I think that is all one sentence, and although he does begin a fresh line, he obviously could not do otherwise, because the preceding line is full, and leaves no room for another word. The circumstances of the clause beginning a fresh line or with a capital "T" go for nothing, because the same things are done in a preceding paragraph where it was not necessary. Therefore, looking at the framing of this will, I think, upon the whole, that it means the remainder of that subject which is disposed of in the particular paragraph, namely, "money or promissory notes or bills which may be in my possession, and what may be due to at the time of my decease at the bank or elsewhere." That is the fund out of which the debts and funeral expenses are to be paid, and what remains of that particular fund is the remainder, and that only, in my opinion, is given to the surviving children. It is not a general gift of residue, but merely of that particular fund. With regard to the authorities cited, I think *Lewis* v. *Nokes* is entirely applicable to this case. With regard to the other case, *Attree* v. *Attree* (1), I confess that, although I come to the conclusion that this is not a general residuary gift, I should have had no difficulty in deciding otherwise in *Attree* v. *Attree*. There the testatrix gave a house and garden specifically, and then several pecuniary legacies. It was impossible to give the residue of pecuniary legacies, and therefore when, after these gifts, she says "all the rest shall be divided," it means "all the rest" or the residue of her property remaining after providing for these particular gifts. Therefore I think that is as clear at least in favour of a residuary gift, as it appears to me, perhaps not quite so clearly, that this is not the general residue. Therefore there is an intestacy as to the general residue.

Statement.

Mrs. *Jacobs* had children all now infants, and the next question was whether the failure of her life interest accelerated the gifts to her children, or the property so given must be considered as undisposed of during Mrs. *Jacobs*' life, and go, as regards personalty, to the next of kin, and as regards realty, to the heir-at-law.

(1) Law Rep. 11 Eq. 280.

J. Pearson, Q.C., and *J. T. Humphry*, for Mrs. *Jacobs*:—

However the case may be as regards real estate, there can be no acceleration as to personalty. This distinction was taken in *Eavestaff* v. *Austin* (1), where the Master of the Rolls held that the testator, by revoking by a codicil an annuity which he had given by his will, shewed an intention to accelerate the interests of those who took the fund subject to the annuity. Here there is no occasion to impute such an intention, and the case does not apply directly. But it is important, because the Master of the Rolls there draws a distinction between realty and personalty, and shews that any technical rules as to remainders, which might in this case be considered to carry the real estate, do not apply to personalty.

Secondly, this is not the case of a gift void in its inception, but only made so by the fact of the daughter having been one of the attesting witnesses. It must therefore be treated for the purposes of construing the will as if it were a good gift, although the person intended to take is by the mistake of the testator disqualified from doing so.

Glasse, Q.C., and *Collins*, for the infant grandchild:—

Though the gift is void in the sense that the person intended to take is incapable of doing so, the intention of the testator must be gathered from the will alone; and for the purpose of construing the will, it must be treated as if the life interest were good. If the children are treated as taking the property immediately, the effect is to make a new will for the testator, and to give them that which he never intended them in any event to have. The clause in the *Wills Act* avoids a gift to an attesting witness, or the husband or wife of an attesting witness, "so far only as concerns such person attesting the execution of such will." Therefore, for the purpose of construction, the gift is not treated as struck out. In *Eavestaff* v. *Austin*, the construction put upon the will effectuated the manifest intention of the testator. *Lainson* v. *Lainson* (2), which is discussed in that case, was also a case of a revocation by a codicil.

Whitehorne, for *Robert Stiles Jull*, supported the same view.

(1) 19 Beav. 591. (2) 18 Beav. 1; 5 D. M. & G. 754.

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Argument.

Higgins, Q.C., and *Colt*, for the infant children of Mrs. *Jacobs* :—

The supposed distinction between real and personal estate has no foundation. There is no decision to support it, and the only case cited puts personalty on the same footing as realty. The Master of the Rolls there, in fact, applied the case of *Lainson* v. *Lainson* (1), which was one of real estate, to a gift of personalty. There is a decision of Vice-Chancellor *Kindersley*, in *Young* v. *Davies* (2), in which he held that the fact of one of several joint tenants being an attesting witness to a will did not sever the joint tenancy, and that the whole went to those who could take. That shews that the Court puts the avoidance of a legacy on the ground of the legatee being an attesting witness, on the same footing as if it were void in its inception.

The authorities on the question of acceleration are all discussed in *Jarman* on Wills (3). They all go to shew that where a life estate fails from any cause, a gift to take effect after its cessation is accelerated. There is no such distinction as suggested between real and personal estate. In *Lainson* v. *Lainson* there was a gift both of real and personal estate, and the two were put on the same footing; and the Master of the Rolls said he was unable to distinguish the case where a person gave an estate which failed from that where he directed himself that it should fail. On appeal the same view was followed; and *Fell* v. *Biddolph* (4) is a recent case to the same effect. Even if there were no acceleration, the effect as regards the personalty would simply be that the interest would accumulate till the children attained twenty-one. There would be nothing left undisposed of.

Glasse, in reply :—

In order to make out a case of acceleration it must be shewn that such was the intention of the testator, as the Lords Justices did in *Lainson* v. *Lainson*, and the Master of the Rolls in *Eavestaff* v. *Austin* (5) and *D'Eyncourt* v. *Gregory* (6). This last-mentioned case was decided solely on the authority of *Turton* v.

(1) 18 Beav. 1; 5 De M. & G. 794.
(2) 2 Dr. & Sm. 167.
(3) 3rd Ed. vol. i. p. 538.
(4) Law Rep. 10 C. P. 701.
(5) 19 Beav. 591.
(6) 34 Ibid. 36.

Lambarde (1). Here the intention is clearly manifested that the children are not to take during the lifetime of their mother, and the contrary cannot be maintained without making a new will for the testator. This is not in any sense a remainder.

MALINS, V.C.:— Judgment.

This is a case under the *Wills Act*, but one which fortunately seldom occurs, of a testator asking some of the members of his family interested under the will to become attesting witnesses. This testator having made his will asked one of his daughters and his son-in-law to become attesting witnesses; the consequence of which is that under the 15th section of the *Wills Act* the gifts to the two daughters are rendered void, and the credibility of the witnesses is established at the same time. [His Lordship then read the clause of the will now under consideration, and continued:—]

The first question is, what would have been the effect of this devise and bequest if the daughter could have taken under it. Property is given to her for life, and after her decease to be equally divided between her children; and notwithstanding what has been urged by Mr. *Glasse*, I take that to be as clear a remainder to the children as the law could possibly create. He says, "I give the property to *A.* for life, and after the decease of *A.* to *B.*," or "after the decease of *A.* to *A's.* children." It is a remainder vested if there are children, or contingent if there are no children. Whenever the life estate expires those in remainder take. Therefore, under the old law, when life estates were forfeitable by any of those acts which formerly would have caused a forfeiture; where property was limited to *A.* for life, and after the decease of *A.* to *A.'s* children, if *A.* had forfeited the life estate his children would have immediately a right, because "from and after the decease" means from and after the determination of the life estate, and however it is terminated, whether by the death of the tenant for life or by forfeiture, it is equally gone. If it was given to *A.* for life, and after the decease of *A.* to *B.*, and *A.* forfeited, *B.* would have immediately had a right of entry, having the next remainder. And it is not contingent on account of taking

(1) 1 D. F. & J. 495. 6 Jur. N.S. 233.

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effect only after the death of *A.* Therefore, in my opinion, it is perfectly clear that the daughter is by this will as to the real estate made tenant for life with remainder to her children, to be equally divided on their coming of age. A remainder is, in my opinion, unquestionably created.

But then comes the question, whether the *Wills Act* by taking away the life estate of the daughter causes an intestacy during her life, so as to carry the property to the heir-at-law, or accelerates the remainder. It is perfectly clear, in the first place, that the children are postponed to the mother simply because the mother is to have the property for her life, but if the mother cannot have the property for her life, why are the children to be postponed? The reason of their postponement altogether ceases; they are not to have it until after her death, because the testator assumed that she would have it during her life. But he was ignorant of the law that if he called in his daughter to be an attesting witness the very gift he made to her would absolutely fail. Now he has postponed his grandchildren, that is, his daughter's children, to the daughter solely, because the daughter was to take for life, and if he had known that she could not take it for life he would not have postponed the children until after her death. He would not have left her and her family totally destitute in the meantime. It is a mere accident that the daughter cannot take the life estate, and I am of opinion that the children are postponed to the daughter simply that she may have the property for life, and if she could not have it for life, the children would have had it immediately. That would be the conclusion I should come to from the reason of the thing without the decisions. But the decisions are all the same way. *Lainson* v. *Lainson* (1) was a decision of Lord *Romilly*, and was affirmed on appeal, and is now a very eminent authority. That was a case in which a testator gave an estate to his son *John Lainson* for life, and from and after his decease to his children. Then *John Lainson's* life estate being subsequently taken away, it was argued that the children of *John* could not take while he was alive, that it was an executory devise, and they were therefore incapable of taking at the present moment. Lord *Romilly* puts the case

(1) 18 Beav. 1; 5 D. M. & G. 754.

thus (1): "The question arose upon the construction of the third codicil of the will of Alderman *Lainson*. It may be shortly stated to this effect: The testator, by his will, gave his real and personal estate to trustees, and directed them, subject to certain payments thereout, to pay the rents to his son *John Lainson* for life, and from and after the decease of his son he gave the estate to his first and other sons in tail male. By a third codicil the testator revoked the bequest in favour of his son, and in lieu of it he gave him an annuity." In that case, therefore, the bequest is taken out of the way by a codicil, and here by an accident. Lord *Romilly*, however, goes on: "But he did not by that or any other codicil dispose of the rents of the estate during the life of *John Lainson*, his son. The question is, whether this creates an intestacy or an acceleration of the estate to the son of *John Lainson*, and I am of opinion that it is an acceleration of the estate to the son, and not an intestacy. I have looked carefully at the authorities, and I am unable to distinguish the case where a person gives an estate to another, and that fails, from the case where the testator himself directs that it shall fail." Lord *Romilly* thus puts the very case. Here there is an attempt to give the estate, and that attempt fails because the testator made a mistake. He then goes on: "Although the expression used is that the estate to the son of *John Lainson* is only to take effect from and after *John Lainson's* decease, I am of opinion that the meaning is 'from and after the determination of his estate by death or otherwise.' In deciding thus I fulfil the intention of the testator. It is expressly stated on the will that the testator did not intend the son to take the estate in addition to the annuity (which he would do if I were to hold there was an intestacy), but in lieu of it. The result is that I must make a declaration that there is an acceleration of the estate to the eldest son of *John Lainson*." Then Lord *Romilly* says that he has looked at the authorities, and he finds that they are uniform. I need not refer to them all. They have been referred to, and they are collected in *Jarman* on Wills (2), and they are all to one effect, and go upon this principle, that a gift to *A.* for life, and from and after the decease of *A.*, to *B.*, *C.*, *D.*, or anybody else, means from and

(1) 18 Beav. 6. (2) 3rd Ed. vol. i. p. 538.

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after the determination of the estate; and whether the estate is determined by revocation or by death, or by the incapacity of the devisee to take, or by any other circumstance, the life estate being out of the way, the remainder takes effect, having only been postponed in order that the life estate may be given to *A.* *Lainson* v. *Lainson* (1) was affirmed by those two eminent Judges Lords Justices *Knight Bruce* and *Turner*, and affirmed upon the broadest principles. And therefore, without going further, it is sufficient to say that that case, based as it is upon the authorities from the earliest period downwards, decides the point which I have now to decide, that the life estate being out of the way, as it is here, by the incapacity of the tenant for life, the remainder takes effect as if there had been no life estate. Here the incapacity arises from the daughter being an attesting witness. If she had been a person absolutely incapable by law to take, the effect would have been the same. Upon those grounds, therefore, I am clearly of opinion that the remainder is accelerated, and the children take just as if the mother had died immediately after the testator.

It is said that this rule of construction does not apply with regard to the personal estate; but Lord *Romilly* has decided in *Eavestaff* v. *Austin* (2) that the same rule does prevail, and the remainder is accelerated. In that case, by a will so much property as would produce £100 a year was given to *A.* for life, with remainder to her children; and by a codicil the life estate of *A.* was revoked, and it was argued that there was no gift to the children until after the death of the tenant for life, and consequently the estate was undisposed of. Lord *Romilly* said there that the same rule prevailed, and the removal of the life interest by the codicil accelerated the remainder, and the children took as if the tenant for life had died.

There is another point which renders this doctrine as to the personalty very important. The rule clearly is, that where personal property is given to a person, or to a class of persons, at a future period, unless the interest is in the meanwhile otherwise disposed of, it is to be accumulated for the benefit of those who ultimately become entitled to the capital. And therefore, if I had not held

(1) 18 Beav. 1; 5 D. M. & G. 754. (2) 19 Beav. 591.

that there had been acceleration with regard to the personalty, I should probably, upon an application to Chambers, be asked for maintenance during the minority.

I am, therefore, of opinion that the effect of the will is to accelerate the remainder, and that the children are entitled in possession to the real and personal estate. There may be some doubt whether this is not a contingent remainder. It is very like a case of *Festing* v. *Allen* (1) which I argued many years ago. This was a decision of the Court of Exchequer, which was afterwards affirmed by Sir *James Wigram* (2), that a gift to *A.* for life and to the children who should attain twenty-one, was a contingent remainder. And where the life estate had failed while the children were in their minority, they would fail to take the estate altogether. I consider that that case was properly overruled in a case which I argued before Vice-Chancellor *Stuart*, of *Browne* v. *Browne* (3). I believe it has been the subject of strife since. My opinion was always against *Festing* v. *Allen*, though it was the judgment of the Court of Exchequer delivered by a very eminent Judge, Lord *Cranworth*.

Therefore, upon all these grounds, I say that the children are entitled to possession of the real and personal estate during the lifetime of the mother. It is to be equally divided between them, the division being postponed till they attain twenty-one.

Solicitors: *Torr, Janeway, Tagart, & Janeway; Monckton, Long, & Co.*

(1) 12 M. & W. 279. (2) 5 Hare, 573.
(3) 3 Sm. & Giff. 568.

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[1873 R. 57.]

Dower, Satisfaction of—Annuity—Priority.

A widow is not entitled to priority over other legatees in respect of an annuity bequeathed to her by her husband, "in lieu, bar, and satisfaction of dower," where the only real estate of the testator was conveyed to him with a declaration against dower.

Where both annuities and legacies are charged upon real estate, although the annuitants have power of distress and entry, the annuities will not have priority over the legacies.

Statement.

JOHN ROPER, by his will, dated in February, 1870, bequeathed various specific and pecuniary legacies. He then bequeathed to his wife, *Emma Roper*, an annuity of £200 during her life, and directed the same to be paid to her quarterly, and to be for her sole and separate use, and that she should not be allowed to have the value of the annuity in lieu thereof, and he declared that the said annuity should be accepted by his wife in lieu, bar, and satisfaction of dower. The testator then gave several other legacies, and he bequeathed to his daughter, *Frances Foord*, an annuity of £50 during her life, and to his daughter, *Mary Ann Green*, an annuity of £50 during her life, and to his daughter, *Sarah Minter*, an annuity of £52 during her life, and he directed the said three several annuities to be paid quarterly, and to be for the sole and separate use of the repective annuitants, without power to alienate or anticipate the same; and the testator declared that the annuities to his wife and to his three daughters should be chargeable upon and issuing out of all and singular the freehold hereditaments and real estate to which he should be entitled at the time of his decease (in addition to the residue of his personal estate), and he empowered his wife and his three daughters severally and respectively, by distress and entry upon and perception of the rents and profits of his said hereditaments and real estate so charged as aforesaid, to recover payment of the said several and respective annuities when in arrear for twenty-one days, and that all the annuitants should respectively have all the powers for recovering

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their annuities that landlords had for arrears of rent; and, subject to and charged with the payment of the several legacies and annuities, and any debts, funeral and testamentary expenses, the testator thereby gave, devised, and bequeathed all and singular his freehold hereditaments and real estate, and all and singular the residue of his personal estate, unto and equally between his son *John Roper* and his daughter *Frances*, in equal shares as tenants in common, and to their several respective heirs, executors, administrators, and assigns, absolutely.

The testator died in January, 1871, and was then seised and possessed of some personal estate and certain real estate, including certain freehold premises called *Grove Mill*. All the testator's real estate had been conveyed to him with declarations that his widow should not be entitled to dower, and he had no real estate which was liable to dower.

In April, 1873, the property called *Grove Mill* was advertised for sale by the trustees of the will, and it was alleged by them as a ground for the sale that the personal estate of the testator was insufficient to pay the debts and funeral expenses, and they proposed to sell the said property in order to answer the legacies given by the will.

The bill was filed by the widow of the testator, alleging that the real estate, so far as it would extend, ought to be applied in payment of the annuities in priority to the legacies; that such real estate was insufficient to provide both for the annuities and the legacies; and that if the real property advertised for sale were sold, and the legacies paid out of the proceeds, the part of the real estate remaining unsold would be an insufficient security for the annuities.

The bill prayed that the real and personal estate might be administered by the Court, and the trusts of the will declared and carried into effect, and that the trustees might be restrained from selling the real estate so advertised for sale.

The case came on upon further consideration.

Argument.

Carson, for the Plaintiff:—

The Plaintiff is entitled to priority in respect of the annuity given to her in satisfaction of dower. According to the old law,

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where a widow was entitled to dower, and she accepted an annuity given to her in lieu of dower, the annuity was entitled to priority; but where she had no dower, the annuity had no priority. This law is preserved by sect. 12 of the *Dower Act* (3 & 4 Will. 4, c. 105); and in order that an annuity given in lieu of dower should have priority, it is still necessary that the widow should be entitled to dower. But the question arises whether to get priority she must be entitled to dower according to the old law or the new law. According to the facts of the present case, the Plaintiff would be entitled to dower according to the old law, but she would not be entitled according to the new law, by reason of declarations against dower contained in the conveyances.

I submit that, according to the true construction of the section, it is sufficient to give her priority if she would have been entitled to dower according to the old law; otherwise the section is meaningless. No provision of the Act could have interfered with the rule of equity giving priority to legacies bequeathed in satisfaction of dower, if this means dower according to the new law. The Court could, without any assistance from this section, have given the priority in the few cases in which the widow is entitled to dower according to the new law. But the section must apply to some cases in which, but for the section, the provisions of the Act would have interfered with the old rule. What were these cases? They must be those cases in which, according to the old law, the widow would have been entitled to dower, and according to the new law she would not. If the old law were to be applied to such cases, a legacy in lieu of dower would have had priority; but if the new law were applicable, such a legacy would have no priority, and in this manner the provisions of the Act would have interfered with the rule. It is with regard to these cases that sect. 12 provides that the provisions of the Act shall not have this effect. In other words, the section says, as I contend, that as far as priority of legacies in lieu of dower is concerned, the old law of dower shall continue; and wherever according to the old law the widow would have had dower, then if a legacy be given to her it shall have priority.

Again, if it is argued that the Plaintiff's annuity has no priority because she has no dower, and that she has no dower because of

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the declarations against dower in the conveyances (which declarations derive their sole efficacy from the previous provisions of the Act), this virtually makes something contained in the Act to interfere with a rule of equity which would according to the old law have given priority to the Plaintiff's annuity. The rule as to the widow's priority is laid down in *Burridge* v. *Bradyl* (1), *Stahlschmidt* v. *Lett* (2), and *Heath* v. *Dendy* (3).

If, however, the Court should be of opinion that the widow is not entitled to priority over the other annuities, she and those annuitants would still have priority over the legacies, because the annuities are all charged upon the real estate, and there is a power of distress and entry upon the estate given to the annuitants. On that ground, therefore, all the annuitants have priority over the legatees.

J. Pearson, Q.C., and *Dixon*, for the other legatees, cited *Acey* v. *Simpson* (4).

Stallard, for the trustees.

Judgment.

MALINS, V.C. :—

This testator having given an annuity to his wife, who, I understand, was his second wife, also gives annuities to his children who were children by a former wife, and he declares "that the said annuity to my wife is and shall be accepted by her in lieu and satisfaction of dower."

Now, the law, I take it, is perfectly well settled, that whenever a testator, having land of which his wife is dowable, gives her an annuity in satisfaction of her dower, she has priority, although the annuity may greatly exceed the amount of any dower she would be entitled to.

If, therefore, the testator were to give an annuity of £500, and declare that to be in satisfaction of dower, the widow would be entitled to priority for the whole amount of the annuity of £500 a year, although it might be ascertained that the dower would have given her £100 a year only. In this case the testator

(1) 1 P. Wms. 127.
(2) 1 Sm. & Giff. 421.
(3) 1 Russ. 543.
(4) 5 Beav. 35.

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declared that the annuity should be in bar of dower. But it turns out that he never had at any period of his life any land whatsoever out of which she was dowable. Because, although he acquired land by purchase, in every instance the conveyance made to him contained a declaration that no wife who survived him should be entitled to dower, and that declaration, by virtue of the 6th section of the *Dower Act*, is just as effectual to bar the dower as the old conveyance to uses to bar dower. He, therefore, never had at any time of his life any land out of which his wife was dowable.

Now, it was decided by Lord *Langdale* in the year 1842, in the case of *Acey* v. *Simpson* (1), that a legacy to a widow in lieu of dower has no priority over other legacies where the testator leaves no real estate. In that case the testator gave his widow a legacy of £50 and an annuity of £100 for life, and he declared that the legacy should be paid without any deduction, and should be accepted and taken by his wife in lieu and satisfaction of and for all dower or thirds at common law or by custom which she might otherwise claim from or upon all or any of his real estate. There was a deficiency of assets to pay all the legacies, and the question was whether the usual rule was to prevail, that the widow's annuity should take priority over the other legacies. It appeared that there were no real estates out of which the widow was dowable. That is exactly the case here. It was there argued for the Plaintiff that the widow was not a purchaser as there was no real estate, and that she ought to come in *pari passu* with the other legatees. The counsel for the widow admitted that they could not successfully maintain the contrary, and the Master of the Rolls decreed accordingly.

Now that is after the *Dower Act*, because the *Dower Act* was passed in 1833, and this was a decision in 1842. In that case the testator had no real estate, and in this case the testator had no real estate out of which his widow was dowable. It appears to me, therefore, that the result is precisely the same.

Mr. *Carson* pressed me very much upon the question whether the widow was entitled to dower under the old law or under the new law. Now the new law has very much deprived the widow of

(1) 5 Beav. 35.

the right to dower, but it has also conferred upon her advantages that she had not before. It has given her dower out of equitable estates. Before this Act passed the widow was only dowable out of legal estates. That is, therefore, a privilege given to the widow. The Act enacts in the 6th section "That a widow shall not be entitled to dower out of any land of her husband when in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land." The 7th section is this: "A widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate, when by the will of her husband duly executed for the devise of freehold estates he shall declare his intention that she shall not be entitled to dower out of such land or out of any of his lands." Therefore it seems to me the fair construction of that section is, that when the will itself bars the widow of her right to dower, then comes in the 12th section, which says, "Nothing in this Act contained shall interfere with any rule of equity or of any ecclesiastical Court by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies." It may apply to the 7th section only, or it may apply generally. I am of opinion it applies generally. It is merely a provision introduced for the protection of the widow. Therefore, when the husband gives an annuity in satisfaction of dower, her right will be just the same as to priority over legacies as if this Act had not passed.

But then comes the question, is the wife entitled to priority in consequence of that declaration that the annuity shall be in lieu of dower? The law, I think, is reasonably settled by the case of *Acey* v. *Simpson* (1), that if the husband has never had any land out of which the widow is dowable, then it is an empty declaration; and if he has land out of which the widow was not dowable, it is equally an empty declaration, because there is nothing of which she was a purchaser. Consequently she stands *pari passu*, in my opinion, with all the other legatees and annuitants. My own individual opinion would be, except where annuities are given to children who have equal claims with the widow, that the widow, as between herself and strangers, ought to have priority; but

(1) 5 Beav. 35.

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unfortunately the law is not so. I am glad to find, however, in this case, that the conclusion I arrive at is one which does perfect justice, because the other annuities are given by the will to the children of the testator by the first wife. They are all, therefore, in my opinion, equally meritorious claimants. I am very glad to find that it does complete justice.

On these grounds, I am of opinion that, inasmuch as there was no land out of which the widow was dowable, the result is just the same as if the testator had no land whatever, and the case is governed by that of *Acey* v. *Simpson* (1).

Another point has been urged, which is, that the widow and all the annuitants have priority over the general legatees, because there was a right of distress and entry. Now I need not observe that when a man gives an annuity chargeable upon his land, although nothing is said about distress and entry, that would be incidental to the gift. That was the decision in *Buttery* v. *Robinson* (2), followed by myself in *Sollory* v. *Leaver* (3). Therefore, without those words being used, the wife would have a right of distress and entry. But all that is set at rest, because he concludes by saying, "and subject to and charged with the payment of the several legacies and annuities, and my debts, funeral and testamentary expenses, I hereby give, devise, and bequeath all and singular my freehold hereditaments and real estate, and all and singular the residue of my personal estate, unto and equally between my son *J. Roper* and my daughter *Frances* in equal shares as tenants in common, and to their several respective heirs, executors, administrators, and assigns, absolutely."

Therefore, my opinion is, that the real estate is charged with all the annuities and all the legacies. That being so, the annuities will have to be valued according to the ordinary rule. They will be valued at the time of the testator's death, and be treated as legacies of an amount in value equal to the annuities; and then the widow, and all the annuitants, and all the legatees, will take rateably, according to the amount of their legacies. That, I believe, will do complete justice. The mode of doing it is very simple: you must convert everything the testator had into money; you must

(1) 5 Beav. 35. (2) 3 Bing. 392.
(3) Law Rep. 9 Eq. 22.

ascertain the amount of the legacies, and now that they are all legacies you must drop the word "annuity" and treat them all as legacies; you must pay the debts, funeral and testamentary expenses, and what remains will be divided amongst the legatees in proportion to the amount of their legacies.

[*J. Pearson*, Q.C.:—In regard to the annuity to the widow, it is directed by the testator that she is not to have the value of her annuity.]

I laid down the rule on that subject in the recent case of *Hatton* v. *May* (1), that where there is merely a declaration that the widow shall not have the value of her annuity, that goes for nothing; but in order to prevent her having the value there must be a gift over. I held in that case that the widow was not entitled to have the value of the annuity, because there was a gift over, and I directed that an annuity should be purchased for the widow, and retained by the trustees, and paid to her during her life.

Solicitors: *Duncan, Murton, Warren, & Gardner*, agents for *Walter Furley, Canterbury; Kingsford & Dorman.*

(1) *Ante*, p. 148.

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[1875 C. 52.]

Companies Act, 1867, s. 38—*Promoter—Omission of Statement of Contract from Prospectus—Suit in the Nature of Action for Deceit—Fraudulent Misrepresentation not proved.*

6 Ch D 360
7 Ch D 252
253,
5 App Cas 109

Plaintiff and Defendant, being both interested, with others, in mines which required the use of coal, Defendant, on the 26th of March, 1873, wrote to the Plaintiff, amongst others, a letter, mentioning a property consisting partly of smelting works and partly of a colliery then for sale, recommending it as a first-class investment, and offering it to the Plaintiff and others in the terms of a prospectus about to be issued. The letter mentioned the capital of and number of shares in a company proposed to be formed for the working of the businesses. On the 10th of May, 1873, Defendant contracted to purchase the property for £16,125 in cash, to be paid by instalments. By another agreement, dated the 29th of May, 1873, Defendant agreed to sell the property to two persons, expressly as trustees for the intended company, for £23,725 in cash, also to be paid by instalments. On the 2nd of June, 1873, a prospectus was issued, in which the name of the Defendant appeared as managing director, and in which the contract of the 29th of May, 1873, was the only one referred to; and on the 9th of June, 1873, Plaintiff agreed to take 200 shares of £5 each in the company, which was registered on the 16th of July, 1873.

At the hearing of a suit, in which the Plaintiff prayed for a declaration that he was induced to take the shares by the fraud and deceit of the Defendant, it was contended that the contract of the 10th of May, 1873, ought to have been specified in the prospectus:—

Held, that the omission in the prospectus of mention of the contract of the 10th of May, 1873, was not fraudulent within the meaning of the 38th section of the *Companies Act*, 1867; and inasmuch as upon the evidence the statements in the letter and prospectus did not amount to misrepresentation, either within the knowledge of the Defendant, or in fact, the bill was dismissed.

Statement.

CAUSE.

The bill was filed on the 18th of February, 1875, by *Robert Craig* against *Henry Louis Phillips*, and after answer, filed on the 5th of May, 1875, was amended on the 17th of July, 1875.

As amended, it alleged that "by reason of misrepresentations and fraudulent suppression, and statements in the prospectus and other documents," the Plaintiff was induced to apply for and obtain the allotment of 200 £5 shares in the *South Wales Smelting*

Leave to appeal after the year in consequence of Tarpey - Gaunt 2 C P D 419 referred to (7 Ch D 249 Ca

and Colliery Company, Limited, upon which he paid £1000; and prayed for a declaration that the Plaintiff was induced to take the shares by "the fraud and deceit" of the Defendant; (by amendment) that the Defendant was liable to indemnify the Plaintiff from the cost of such shares; and that the Defendant might be decreed "to repay to the Plaintiff the sum of £1000, "paid by him on the shares so taken by him as aforesaid," with interest.

The undisputed facts were as follows:—

In and before March, 1873, the property, which consisted of a smelting works and rolling mills, together with a colliery, at *Penclawdd, Glamorganshire*, belonged to a Mr. *Townsend Kirkwood*, who, after some preliminary correspondence, by a letter of the 24th of March, 1873, made a formal offer for sale of the property to the Defendant.

The Defendant, Plaintiff, and others, were jointly interested in some Cornish mines, and on the 26th of March, 1873, the Defendant caused a printed circular of that date to be sent to the Plaintiff and others, which contained the following passages:—

"My dear Sir,—The coal question, as affecting those mines in which you and I are specially interested, is one of very serious importance. Having regard to the high prices we are now paying, and to the very inferior quality of the coals supplied, the difference is about 100 per cent. against our mines, which, upon a consumption of some 12,000 tons yearly, amounts to a very large sum. This is a matter which must be dealt with boldly, and as every shareholder in Cornish mines is interested in the question, he should do his utmost in his individual capacity to remove the difficulty. . . . The only way to overcome the difficulty is for all the shareholders in our mines themselves to possess a good colliery." [The writer then mentioned the *Penclawdd* property, and proceeded] ". . . It gives me much pleasure to state that the business will be exceedingly lucrative, is of a very high class character, and affords an opportunity that rarely occurs. . . . Even if it did not possess the manifest advantages of insuring first-rate coal at fair prices for our mines, I do unhesitatingly lay it before you as a first-class investment; already giving large profits, and one that will moreover steadily increase in prosperity

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and importance. The property comprises two valuable concerns —a well-known smelting works in *Wales*, and a colliery immediately adjoining. . . . The reputation of the works and their brand is well known throughout the kingdom. . . . I have very strong reasons for knowing that this is an opportunity which will not again occur. In offering it to you in the terms of the prospectus, I have kept in view the requirements of our position. . . . I may mention that the property will be at once taken up by others, if declined by you. . . . The coal is of the very finest bituminous quality, and, what is of great importance, perfectly free from fire-damp. . . . The properties may be very briefly described as follows:—Smelting works, colliery, railway, and free dock, capable of taking vessels of 200 tons burden. . . . The sole object of my now addressing you is to ascertain what interest you are disposed to take in the undertaking. The capital of the company will be £75,000, in 15,000 shares. . . . Whatever investment you may make in this new company, it is calculated to produce you at once large and regular dividends. The profits of the smelting works alone have hitherto ranged from 15 to 20 per cent. per annum. . . . It is a going concern, and in thorough working order. . . . In order to ascertain practically what each individual shareholder will do in this matter, I wish to ask you how many of these shares of £5 each you will take in the event of your approving of the prospectus which will be shortly issued. I enclose you a printed form of reply, so as to save you any trouble of writing, and all that you have to do is to fill in the number of shares you propose taking, and return it to me as soon as possible in the enclosed stamped envelope. You are not committed to take any shares at all if you do not like to do so. It is merely for my guidance now, for as soon as I receive all the replies, the prospectus will be sent to each person who has sent me the enclosed form, and no prospectus will be sent to those who do not so reply. The concern is not a speculation at all, but an investment; and, instead of my working it by myself and with one or two others, I am quite willing you should share in its advantages, which will be more fully and accurately referred to in the prospectus which will be shortly issued."

By a deed dated the 10th of May, 1873, it was agreed between

Kirkwood and the Defendant that the former should sell and the latter should purchase the above-mentioned properties, leases, and businesses, for the sum of £16,125 in cash, to be paid by instalments—£4000 within four months, £4000 within eight months, and the balance of £8125 within twelve months from the date of the agreement. Interest on deferred payments was to be at £10 per cent. Upon payment of the first-mentioned sum of £4000 (agreed to be paid on the 10th of September, 1873), *Kirkwood* was to put the Defendant into possession.

By another agreement, dated the 29th of May, 1873, and made between the Defendant and Messrs. *Henry Rutter* and *Thomas Lambe Phipson*, as trustees of the company then about to be incorporated, it was agreed that the company when formed should purchase and the Defendant should sell the properties, leases, and businesses for £23,725 in cash, to be paid by instalments of £8000 within three months, £5000 within six months, and the balance within nine months. Interest on deferred payments in this contract was to be at £6 per cent.

The title-deeds of the property remained with *Kirkwood*.

On or about the 2nd of June, 1873, a prospectus was issued by or by the direction of the Defendant, in which his name appeared as managing director. The following passages became of importance. After statements as to the objects of the company, and the extent and situation of the works, it said:—

"The facilities for the conveyance of minerals and coals by sea to and from *Cornwall* and *Devonshire* are also exceptionally good. An excellent free dock adjoins the works, giving accommodation to vessels of 200 tons burden, therefore vessels bringing lead ores from *Cornwall* can load back with coals for the mines. . . . This company is supported by several very influential gentlemen, who are connected with important mines in *Cornwall* consuming about 12,000 tons of coal yearly, and they have already agreed to subscribe for shares to the extent of several thousands of pounds. That connection alone is very valuable to this company, but other mines will readily accord their support, for it is estimated that the present price of coal is equivalent to an addition of some £150,000 a year in the cost of working the Cornish mines; the coal in excess, therefore, of the requirements of the smelting

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works can be sent to that market. The smelting works, &c., are in complete working condition, and are capable of smelting some 5000 tons of ores, and turning out about 3500 tons of best pig lead, and 200,000 ounces of cake silver per annum, while the rolling mills, which have been but recently constructed (and are the only mills in *South Wales*), can manufacture 2000 tons of sheet lead yearly . . . The profits on an average of several years have been exceedingly satisfactory, and regular and large dividends may be expected with entire confidence . . . The property is offered to the public as a *bonâ fide* means for the employment of capital to extend an already remunerative business. The consideration to be paid by the company for the purchase of the several leases under which the property is held, the goodwill of the business, plant, machinery, houses, buildings, &c., is £23,725. Mr. *Henry Lewis Phillips* is the owner and vendor of the property . . . A contract has been entered into, dated the 29th of May, 1873" (the prospectus stated the parties to and terms of the deed). . . . "No promotion money whatever will be paid. The expenses will be simply confined to the amounts necessarily disbursed."

On the 9th of June, 1873, the Defendant again wrote to the Plaintiff, asking him to take shares. He said, "You may rely with the utmost confidence not only in having dividends this year, but in having a very much higher rate of dividend than is usually to be obtained;" and on or about the same day the Plaintiff filled up a form which had been enclosed, with an application for 200 shares, and paid a deposit of 10*s.* a share.

The printed form of application was as follows:—

"To Mr. *H. L. Phillips*,

"32, *New Broad Street, London.*

"I shall be glad to receive the prospectus of the property referred to in your private letter of 26th March.

"In the event of my approving of the said prospectus, &c., I should be willing to take about shares in the Company, which you state will be of the value of £5 each, and to pay the deposit of 10*s.* per share upon application, and 10*s.* per share on allotment; but until I have read the prospectus and sent you the usual proper form of application, you are not to consider this

letter as an application for shares at all, but merely for your guidance in ascertaining what number of shares those persons who are shareholders in the mines wish to have reserved for them before the prospectus is issued to the public."

[Signature.]

[Address.]

[Date.]

The company was registered on the 16th of July, 1873, and by the articles the Defendant was appointed permanent managing director, with a salary of £350 a year.

On the 9th of February, 1874, the Plaintiff, in answer to a letter of the Defendant asking him to increase his present holding, said there was little encouragement to do so, seeing there was no dividend forthcoming even yet, "although you positively affirmed there would be such during the past year."

In reply, the Defendant, on the 23rd of February, 1874, said he hoped to commence the smelting business in six weeks' time. "Meanwhile we have the pleasure of knowing our property has greatly improved in value, and this must therefore make itself felt in the future. Let me tell you that you have got a first class investment here, and I do hope you will send us a further application for shares, for we don't want to advertise for capital."

On the 30th of March, 1874, the Defendant sent a circular letter to the Plaintiff, amongst others, suggesting that £15,000 should be raised by the issue of debenture bonds of £50, bearing interest at £8 per cent., and in answer to a letter of the Defendant on the 7th of April, 1874, the Plaintiff on the 9th of April declined to invest in the debenture bonds.

Plaintiff had before the filing of the bill paid up the full amount of £1000 on the shares.

The bill stated, amongst other things, that the Defendant entered into the contract with *Kirkwood* with the view and intention of forming a company, and charged that he ought to set forth the terms of the same; that the letter of the 26th of March, 1873, was a notice inviting persons to subscribe for shares within the meaning of sect. 38 of the *Companies Act*, 1867; that it ought to have specified the dates and the names of the parties to the contract, and that the omission was fraudu-

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lent on the part of the Defendant as regarded the Plaintiff who took shares on the faith, amongst other representations, of that letter. The bill alleged that the statements in the letter that the business would be "exceedingly lucrative," that it was a "first class investment," and as to the profits of the smelting works alone, were "materially untrue" and were inserted by the Defendant "with the view of deceiving" the public. It also alleged that the prospectus was issued with the same view, and contained false statements of fact; that the Defendant was not "owner" of the property further than that he had entered into a contract for the purchase of the works, which he had concealed from the shareholders and directors; and that, not having the means of paying for the same, he intended to pay *Kirkwood* out of the moneys to be received from the company, *Kirkwood* retaining the deeds as security; that the alleged "excellent" dock was in a ruinous state and practically useless, and that owing to the tide vessels of 200 tons burden could not enter more than twice a month; that the statements as to the average profits and that large dividends might be expected were known to the Defendant to be untrue; that the profits on an average of several years had not been "satisfactory or regular," and that the Defendant had "no ground for the expectation of" large dividends. The bill alleged that the statements as to the business being a "paying concern" and "remunerative" were known to the Defendant to be untrue; and charged that it was a losing concern, that there was no room for the employment of £75,000 capital in it, and that not more than £3000 had ever been employed in it by *Kirkwood*. The bill charged that the contract with *Kirkwood* should have been specified in the prospectus, and that the omission was "fraudulent" on the part of the Defendant; and alleged that the statements in the letters of the 9th of June, 1873, and the 23rd of February, 1874, were known to the Defendant to be untrue.

The Defendant, in his answer, said that when *Kirkwood* made him the offer to sell, he made up his mind to purchase the property, and he had then to determine how he should work it. Two courses were open to him, one was to join two or three friends, and work it as a private concern, the other was to form a company of those shareholders who were interested in his Cornish mines.

The circular of the 26th of March, 1873, was issued by him before he had mentioned a word to any one about a company. The object of the haste was the then high price of coal. He then set out the contract with *Kirkwood* of the 10th of May, 1873. At this time it was uncertain whether any company would be formed. If no such company had been formed he should have gone to his private friends to join him in working the premises as a private concern. He denied that his purchase was in any way "dependent or contingent" on the formation of this or any other company. He admitted that he paid the last instalment in the month of January, 1875, instead of May, 1874. The reason was a difficulty raised by *Kirkwood* in completing his title to a part of the property. He denied that such instalment was paid out of moneys received from the company. It was paid out of the general balance at his bankers. He submitted that the letter of the 26th of March, 1873, was not a notice inviting persons to subscribe for shares within the meaning of the Act; it was simply a letter written for private guidance, to enable him to form an opinion as to which of the above two courses he should adopt. The letter having been sent in March, and the contract with *Kirkwood* not having been completed until the 10th of May, he denied that the letter ought to have specified the date of or names of parties to the contract, or that the letter not specifying the same was fraudulent. No prospectus was sent with that letter. He denied that the Plaintiff took shares in the company on the faith of that letter. He denied that the statements in the letters complained of were materially or in fact untrue. Between the 10th and the 29th of May Messrs. *Rutter & Phipson* agreed with Defendant to form a company, and the contract of the latter date was entered into. He denied that the prospectus was issued with the view of deceiving or misleading the public, and denied that it contained false statements of "material or important facts, or that any statement therein was known to me to be false." He admitted that no profits had yet been made or dividends paid by the company, but said that the property had greatly and permanently improved in value since the company took possession, and that there was a good prospect of dividends as large as those indicated in the prospectus.

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The amended bill set forth the agreement with *Kirkwood*, alleging that the relation between the Defendant and the company was "then fiduciary"; that the suppression from the prospectus of the fact that he, being the promoter and managing director, had not at that date paid anything for the works, but had procured the Defendant company to agree to give him a price, the time and manner of payment of which would not only anticipate and exceed his own payments to the company, but give him a secret profit of £7600, by a private and undisclosed dealing with the real owner and vendor of the property, was a fraud on the Plaintiff; and that the meaning of the circular, prospectus, and letter, taken as a whole, was that the concern comprised smelting works, then in active and profitable operation, and an open colliery, with a supply of coal immediately available.

In further answer, the Defendant said that the smelting works were in complete order when the company purchased them. He admitted that no coal had been reached when he wrote the letter of the 26th of March, 1873, but said he knew at that time that first-rate coal could be speedily obtained from the colliery at fair prices, and that this had turned out to be the case. He also explained how an item of "preliminary expenses, £2223 14*s.* 8*d.*," in a balance-sheet presented on the 6th of May, 1875, was arrived at; one of the constituents being £252 10*s.* for "commission paid on placing shares."

Argument.

Sir *H. Jackson*, Q.C., and *Langley*, for the Plaintiff:—

If a prospectus has misrepresented or has concealed material facts, and a reader has been thereby deceived into becoming an allottee, he is entitled to proceed against those who have misled him: *Peek* v. *Gurney* (1). In *Scott* v. *Dixon* (2) a director's report contained a statement that a dividend was about to be paid out of the profits, and that the shares were a safe investment for the money; and the Plaintiffs bought on the faith of the report. *Gerhard* v. *Bates* (3) is another authority for the rule that a prospectus containing an untrue representation may be made the ground of an action by a purchaser of shares who

(1) Law Rep. 6 H. L. 377. (2) 29 L. J. (Ex.) 62, n.
(3) 2 E. & B. 476.

has been deceived. See the explanation of the case in *Peek* v. *Gurney* (1). In *Kent* v. *Freehold Land and Brickmaking Company* (2), a Plaintiff was held entitled to relief in equity on the ground of misrepresentation as to the amount of subscribed capital and as to the purchase-money: *Beck* v. *Kantorowicz* (3). Under the old practice, then, the Plaintiff could have brought an action of deceit.

In this case, it was upon the faith of the letter of the 26th of March, 1873, and of the prospectus, that the Plaintiff took shares. The letter contained three material misrepresentations; one, that the profits of the smelting works had hitherto ranged from 15 to 20 per cent.; secondly, that it was a going concern, and in thorough working order; and thirdly, that part of the property consisted of a dock capable of taking vessels of 200 tons burden.

The prospectus also describes the smelting works as being "in complete working condition;" and that the profits on an average of several years had been "exceedingly satisfactory."

Moreover, the omission from the prospectus of the deed of the 10th of May, 1873, rendered the prospectus a fraudulent document within the 38th section of the *Companies Act*, 1867 (30 & 31 Vict. c. 131).

In *Gover's Case* (4), if *Mappin* had been a promoter, the prospectus, which omitted mention of his purchase, would have been held to be fraudulent. Here the Defendant was a promoter.

The Plaintiff is willing to deal with his shares as the Court shall direct.

Upon a fair construction of the language, it must be held to have been intended to convey, as we say it did to the Plaintiff convey, an impression that the concern was actually at work, and making profits.

Kay, Q.C., and *W. W. Karslake*, for the Defendant:—

The Plaintiff seems to be in doubt whether to put his case as an action of deceit for misstatement of facts, or for holding out prospects which have not been realized. But no amount of exagge-

(1) Law Rep. 6 H. L. 398, 399.
(2) Ibid. 4 Eq. 588.
(3) 3 K. & J. 230.
(4) Law Rep. 20 Eq. 114; 1 Ch. D. 182.

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ration in a prospectus of the property of a concern will give a shareholder a right to have his name taken off the register, still less to maintain an action of deceit. *Henderson* v. *Lacon* (1) shews that in order to obtain relief against directors you must fix them with guilty knowledge—you must prove the *scienter*.

What is the nature of the misrepresentation here, assuming that there is one? "Mere assertions of value by the vendor of property are not fraudulent in law, though erroneous or false": *Kerr* on Fraud (2), referring to cases of which the last is *Central Railway Company of Venezuela* v. *Kisch* (3). So that, where these documents speak of what is in prospect, they are not fraudulent; a misstatement, in order to be fraudulent, must be a statement of an existing fact.

Then, was the deed of the 10th of May, 1873, a "contract" entered into by "a promoter, director, or trustee" of the company within the meaning of the 38th section? *Gover's Case* (4) does in effect govern this. There *Mappin* was not a promoter of the company, either when the contract was entered into or at any time afterwards. In this case the Defendant became a promoter of the company, but he was not a promoter at the date of this contract, because at that date there was no such thing as a company. The difference is clearly marked by the case of *Imperial Mercantile Credit Association* v. *Coleman* (5), where it was held that *Coleman*, being in a fiduciary position towards the company, could not retain profits against them. At the date of the 26th of March, 1873, *Kirkwood* had not contracted to sell; he was free to keep the property or deal with it as he thought fit. The company had no existence actual or potential until the 29th of May, 1873.

Sir *H. Jackson*, in reply.

Judgment.

BACON, V.C.:—

In this case the Plaintiff asks for a declaration that he was induced to take shares in a company by the fraud and deceit of

(1) Law Rep. 5 Eq. 249.
(2) Page 44.
(3) Law Rep. 2 H. L. 99, 113.
(4) 1 Ch. D. 182.
(5) Law Rep. 6 H. L. 189, 202.

the Defendant, and that the Defendant is liable to indemnify him in respect of any loss on such shares.

The suit, therefore, is to be dealt with on the same principles as those which, before the *Judicature Act*, prevailed in actions for deceit in Courts of Common Law, and which have always prevailed in Courts of Equity—namely, that the fraud and deceit alleged must be proved.

The provision in the statute is of a totally different kind. I do not understand that in *Gover's Case* (1) the Judges of the Court of Appeal decided anything more than their decision expresses. If the shareholder who was the claimant in that case has any remedy against *Mappin*, she is left free to pursue that remedy in any way she may think fit.

The prospectus in this case complies with the statute to the extent of stating that Mr. *Henry Louis Phillips* was the owner and vendor of the property. It states the terms of the deed of the 29th of May, 1873, and that the consideration to be paid by the company was £23,725. In my opinion the statute has been literally complied with, and it is impossible successfully to raise any questions upon non-compliance with its terms.

But treating this bill as an action for deceit, it is necessary for the Plaintiff, who alleges, as he does, in very plentiful and very pointed terms, that a fraud has been practised upon him, to prove that fraud to the satisfaction of the Court.

Now what are the facts? There are very few facts in dispute. Different views are taken of the same subject, but substantially the difference is small. The works in question have been carried on for a series of years by Mr. *Kirkwood* at a profit, as the accountant who prepared the balance-sheet for some years up to the time of the dissolution of the partnership proves. The books are not forthcoming, and there are no means of ascertaining whether the statements made by the accountant are accurate or not. It is impossible, therefore, that any judicial decision can turn upon that part of the case. But taking the evidence as it stands, for all the years mentioned by the accountant there was a profit. Mr. *Kirkwood*, for some reason which I need not enter into, puts an end to the partnership as soon as he could get rid of

(1) 1 Ch. D. 182.

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his partner, and then carries on the business for himself. The profits which he derived from the business carried on by himself are by him clearly proved, and that part of the case is open to no contradiction. Sir *Henry Jackson* said that he did not press that part of the case further than to mention that Mr. *Kirkwood* was a vendor and Mr. *Phillips* was a purchaser. Mr. *Phillips* was interested greatly in Cornish mines, to which a supply of coal is a thing very much to be desired. He looks out for a property in *Wales*, and becomes acquainted with this colliery, which is for sale. His manager applies to the manager of the *Penclawdd* smelting works, who happens to be a relative by marriage. The Defendant sends a paper of interrogatories in order that he may acquaint himself with all the particulars, and sends it to the only place from which accurate information can be derived. He gets an answer containing a perfectly accurate and true statement, without exaggeration of any kind, of the nature of the property and the supposed value of it, derived from the profits which had been made by it for many years by Mr. *Kirkwood*, and what the Defendant writes in that letter of March, 1873, is derived from the information thus acquired. He does not profess to know anything of his own knowledge, or further than what he collects from the inquiries he has made, and there is not a misrepresentation of any kind in that letter of March, 1873, as I read it. It is such a letter as one would reasonably expect, considering the connection that subsisted between the Plaintiff and the Defendant; and although the Plaintiff, who seems to suffer under a lamentable want of recollection, said in his examination that he did not know anything about the mines in *Cornwall*, yet very pointed allusion is made to them in this letter. [His Lordship read extracts from the letter, and continued:—] All through the letter, the Defendant, speaking of his desire to retain the property for himself if he has money enough, asks, "How many of these shares of £5 each will you take in the event of your approving of the prospectus which will be shortly issued?" and so forth. So that from the beginning to the end there is no distinction between the smelting works and the colliery. They are always spoken of at the same time; but the main object, I think I may say, was the securing of the colliery—the smelting works being merely an

adjunct to that. I suppose the one could not be purchased without the other, but it is evident from the whole tone of the letter that the colliery was the principal reason the Defendant had for making the statement he did.

Now, I ask, is there any misrepresentation in that letter? If there is, of what does it consist? These smelting works had been established for years, were in most thorough working order, as the witnesses have proved, were actually in working condition at the time, and, as to the profits derived from them, there is no guarantee of any profits. Reading the letter fairly, and supplying all that the subsequent evidence enables me to supply, it comes to this, that the communications between Mr. *Phillips*, *Kirkwood*, and others, having given Mr. *Phillips* certain information, he adopts that information without any sort of exaggeration or addition of his own, and puts the information into that letter which the Plaintiff says induced him to take these shares.

If the case stood upon that letter alone, in my opinion there is nothing from which I can impute to Mr. *Phillips* any intention to deceive. Well, then, the prospectus comes next; and it must be observed that, after that letter was written in March, the Defendant, who seems to have been satisfied that the business was a very good one, of his own responsibility, and with his own moneys, buys from Mr. *Kirkwood* the works, the subject of the company afterwards formed; and he buys it for £16,000 odd. Up to that time nobody can say the Defendant was bound by the letter of the 26th of March. The Plaintiff cannot say he had then agreed to take any shares; quite the contrary. He was not committed to take any shares; he was asked how many shares he would like to take. The Defendant being a free man, notwithstanding that letter, pays £16,000 odd for the property. He states that at that time he intended to work the business in connection with some capitalists, whose names he mentions, but that the negotiations with them fell through, and he thereupon determined that a company should be formed.

Thereupon the company is formed, and the Defendant, having, as he says, made a most excellent bargain, having bought for £16,000 what he was persuaded was worth £23,000, sells it to the trustees of the company for that sum—openly, above board, with

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no suppression of any fact—and the prospectus is issued, specifying the actual price which the company is to pay, and specifying, as the statute requires, the date and the names of the parties to the deed; the object of the statute being that no person shall be misled by a prospectus into taking shares in a company the nature of which he is not aware of.

The main stress of the argument has been that the prospectus spoke of a coal-mine and of a certain dock forming part of the smelting works, and described them in a manner which was in itself untrue, and which, being held out to the Plaintiff, was that act of deceit on the part of the Defendant which induced the Plaintiff to take the shares in question.

As to the colliery, it is said the value of it was exaggerated and was untrue. The Plaintiff's own evidence is, that the colliery is one of the very best in the kingdom; and to say that there was in the prospectus any misrepresentation as to the state of the mines is to say that which, in my mind, is opposed to the plain evidence in the case.

Then the other charge is this: The letter and the prospectus state that a part of the smelting works consists of a dry dock capable of receiving vessels of 200 tons burden. Now, is there any evidence that that is untrue? Mr. *Kirkwood's* evidence is that, owing to the change in the course of the river, the entrance to the dock became silted up, and that he then did what every riparian owner does when such a thing happens, he cleaned out the channel, dug it down to the hard foundation, and then, by means of the sluices, carried away the accumulated sand, which before that had blocked up the entrance to the dock. If that is done to-morrow, the same result will follow; it will still be a dry dock, capable of containing vessels of 200 tons burden. Whether it will answer the purpose of the owners or not to make that use of it can have nothing to do with the question I am considering, which is, whether the statement is such an act of deceit as to entitle the Plaintiff to say, as he does in no measured terms, that the Defendant has so practised upon him as to get from him £1000 which he would not have parted with if he had known the truth.

The rest of the evidence amounts to this—that the arrival of the railway changed the course of business, and that it was found

more convenient to send cargoes of ore from the works down to the port of *Swansea*, and ship from thence, than to bring ships up to the dock, especially as ships do not now come regularly from *Cornwall*, and since 1871, which was the last date given by Captain *Rogers*, there has been no large vessel in the docks. But, for anything I know, there may be a large vessel there to-morrow. The extent to which the channel may now require scouring does not matter, but the clear, positive fact remains, that the dock may be cleared whenever it is required; that is proved by Captain *Rogers*, and it remains untouched by any kind of evidence. The purchase of the mines formed a considerable inducement to Mr. *Phillips* when he made the purchase, and that the mines themselves formed a valuable part of the purchase Mr. *Kirkwood* has proved, and he gives his reasons for it. That is mentioned in the prospectus; and if I stop at this point, I ask where is the deceit? It is not sufficient simply to allege fraud and deceit, but the Plaintiff must, in order to prove fraud, prove that Mr. *Phillips* had perfect knowledge of the facts, and that, knowing them, he wilfully made a misrepresentation to induce the Plaintiff to enter into the company. In my opinion there is no pretence for saying this.

Then, what was the result of the subsequent operations? The concern was a going concern at the time. Some months elapsed before possession could be taken, because Mr. *Kirkwood* was to clear out that part of the property which belonged to him. Some further time elapsed before the works could be got into working order, but they were set into working order, they are in working order now; the colliery is also in working order; the balance-sheet, altered to the report which has been given in evidence, shews that it is in a state of profitable working, and I have nothing before me to shew that the £1000 laid out by the Plaintiff was not as well laid out as any other £1000 could be, or that the Plaintiff has sustained any injury whatever.

In my opinion there is no ground for the charges that the letters contained fraudulent misrepresentations and suppressions. Nor is there any ground for saying that sect. 38 of the statute has not been complied with, or that for any other reason the Plaintiff, as a shareholder, is entitled to relief. I am of opinion

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that the case entirely fails. The bill must be dismissed, and, as it is a bill which seeks to fix the brand of fraud on a man in whose conduct I can find nothing to censure, it must be dismissed with costs.

Solicitors for Plaintiff: *Hughes, Hooker, Buttanshaw, & Murton.*
Solicitor for Defendant: *Alexander Kerly.*

V.-C. B. 1876 *June* 16.

HUBBARD *v.* ALEXANDER.

[1870 H. 177.]

Will in Duplicate—Legacy repeated—Evidence.

At the death of a testator two copies of his will were produced, one of which had been retained by himself, the other deposited with his bankers; each with a codicil containing the same gift in the same words, but of different dates, and attested by different witnesses. Probate having been granted of the duplicate will and of the two codicils:—

Held, that evidence by one of the attesting witnesses to one of the codicils was admissible for the purpose of shewing, from the circumstances attending the execution, that the two codicils were not two but one instrument, and accordingly that the legatee therein named was entitled to one legacy only.

Statement.

FURTHER CONSIDERATION.

John R. Alexander, the testator, whose estate was being administered in this suit, executed a will in duplicate, dated the 11th of December, 1863, and retained one copy in his own possession, the other being deposited with Messrs. *Mackrell*, his agents and bankers in *London*.

In 1865 the testator obtained from Messrs. *Mackrell* the copy of the will which had been deposited with them, and added thereto a codicil, giving "unto my brother-in-law, *H. S. B. Bruce*, the sum of £2000, the same to be paid after the decease of myself and my said wife to the said *H. S. B. Bruce*, or to such person or persons as he may by deed appoint."

The execution of this codicil was dated the 8th of November, 1865, and it was attested by *Robert Wynne*, solicitor, of *Mallow*, county *Cork*, and *John Denny*, his clerk. The will and codicil were returned by the testator to *Mackrell & Co.*

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On the death of the testator in January, 1869, a codicil in precisely the same words and figures as that attached to Messrs. *Mackrell's* copy of the will was found attached to the copy which had remained in the testator's possession, except that it bore date the 11th of September, 1867, instead of the 8th of November, 1865, and was attested by different witnesses.

Statement.

Probate of the two wills described as duplicates and of the two codicils had been granted by the Court of Probate.

Evidence was tendered for the purpose of explaining the execution of the codicil to the will which had been retained by the testator in his own possession. Mr. *Kendall*, a solicitor, and one of the attesting witnesses to this codicil, deposed that on the 11th of September, 1867, he and the testator were fishing in the west of *Ireland*. On that occasion the testator asked him to attest a codicil to his will, which he then produced: "and I consented to do so. I did not act professionally on his behalf. I did not read the codicil, but he certainly did mention that it was a duplicate of one he had executed in *England*, and that he wished to attach the same codicil to his own duplicate copy of the will. The date of execution was inserted by me, or under my direction. I am positive that Captain *Alexander* (the testator) intended the codicil to be merely a duplicate copy of the one he had previously executed."

Argument.

Eddis, Q.C., and *Pemberton*, for the Plaintiffs, tendered this evidence, and contended that the Mr. *Bruce*, the legatee named in the duplicate codicils, was entitled to one legacy of £2000 and no more.

Primâ facie, two legacies given to the same person by distinct testamentary instruments are cumulative: *Wilson* v. *O'Leary* (1); but that presumption may be rebutted by circumstances: *Russell* v. *Dickson* (2); and evidence is admissible to enable the Court to place itself in the position of the testator, and for the purpose, in this case, of shewing that the second codicil was executed as a mere duplicate of the former codicil, and formed but one instrument, and accordingly, that the two gifts were not cumulative, but

(1) Law Rep. 7 Ch. 448. (2) 4 H. L. C. 293, 304.

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Argument.

mere repetition: *Whyte* v. *Whyte* (1); *Martin* v. *Drinkwater* (2); *Guy* v. *Sharp* (3).

Phear, for the legatee:—

Evidence is only admissible for the purpose of ascertaining the knowledge possessed by a testator at the time when he made his will, *e.g.*, where the description of the legatee, or of the thing bequeathed, is applicable equally to two persons or to two things, but not communications which have passed between the testator and a solicitor written by way of advice or statement, or anything else: *Bernasconi* v. *Atkinson* (4); *Wilson* v. *O'Leary* (5).

In this case, there being two codicils of different dates, attested by different witnesses, to both of which probate has been granted, the *primâ facie* rule that they are distinct instruments, and that the gifts are cumulative, so as to entitle the legatee to both, must prevail, especially where, as in this, there is no inconsistency and nothing to shew that they could not co-exist, except as mere duplicates: *Whyte* v. *Whyte*; *Wilson* v. *O'Leary*.

Sir *H. Jackson*, Q.C., *Macnaghten*, and *Grenside*, for other persons interested under the will; and *Rigby*, for the Crown, also appeared in the case.

Judgment.

BACON, V.C.:—

Both rules are very distinctly laid down in the authorities, and have become the law of the Court, and the authorities adverted to are merely illustrations of the application of those rules. Speaking generally, if a legacy is given by one instrument, and another legacy is given by another instrument, that would be a cumulative legacy. What I am asked in this case to consider is whether there is any different instrument, because, unless I am satisfied of that, there is no reason for the application of the rule. Consider what the facts are, and which I must attend to, and which are clearly in evidence. The testator makes his will in

(1) Law Rep. 17 Eq. 50.
(2) 2 Beav. 215.
(3) 1 My. & K. 589.
(4) 10 Hare, 345, 348.
(5) Law Rep. 7 Ch. 448.

duplicate, and leaves one copy with his banker, and retains the other copy in his own possession. It occurs to him that he will leave a legacy to the present claimant, and accordingly he sends for his will from the banker. He makes a codicil to it, and in that codicil he gives this legacy of £2000. He sends the will back, and keeps the other duplicate copy of the same will.

I admit the evidence of Mr. *Kendal* for the purpose of shewing that these codicils were not two distinct instruments, but not for the purpose of construing them. The codicil "to my foregoing will" was attested by Mr. *Kendal*. It was attached to the copy of the will retained by the testator in his own possession, and it is proved to have been his intention to execute a duplicate of that which he had made before. He has done it effectually, and in my opinion it is not a different or a separate or distinct instrument. There is one legacy of £2000, and no more, and that, I take it, is consistent with all the authorities which have been referred to. It must be declared that the Defendant *Bruce* is entitled only to a single legacy of £2000.

A further question arose upon a gift of one-third of the residue of the testator's estate "unto the trustees of the *Royal Benevolent Society*."

It appeared that at the date of the will a society called the *Royal Benevolent Society* was in existence, but that in 1866 the society changed its name to that of the "*Universal Beneficent Society*." The gift of one-third of the residuary estate was claimed by this society.

BACON, V.C., held that the *Universal Beneficent Society*, under which title the *Royal Benevolent Society* continued to exist, was entitled to the legacy given by the will to that society under the name by which it was then known.

Solicitors: *Meynell & Pemberton; T. Graham.*

V.-C. B.

1876

July 22.

In re GOOCH'S ESTATE.

Practice—Lands Clauses Act (8 *Vict. c.* 18), *s.* 69—*Trustees for Sale*—"*Party becoming absolutely entitled.*"

7 Ch D 710
24 Ch D 663

A fund in Court representing the purchase-money of leaseholds taken by a railway company under the *Lands Clauses Act*, ordered to be paid out to trustees having a power of sale, the *cestui que trust* being an infant.

Statement.

THIS was a petition by the trustees of the will of a testator, who died on the 7th of April, 1832, and by the executor of *Albert Gooch*, praying that a fund of stock and cash in Court representing the purchase-money by a railway company of a portion of leaseholds bequeathed to the trustees upon trust for the benefit of *Albert Gooch*, *Juliana Gooch*, and *Caroline Gooch*, might be transferred and paid to the Petitioners, in order that they might be able to transfer and pay the same, together with other moneys arising from the sale to another purchaser of another portion of the same leaseholds, to the parties beneficially entitled.

The will gave to the trustees a power of sale, but contained no receipt clause.

Juliana Gooch, afterwards *Dresser*, had died, leaving an infant child; and *Caroline Gooch*, afterwards *Hone*, had also died, leaving five infant children.

Argument.

Jervis, for the Petitioners, referred to *In re East* (1).

Farwell, for the railway company, did not oppose, but called the attention of the Court to *In re Reaston's Estate* (2).

Judgment.

BACON, V.C., made the order as prayed, directing the Petitioners to hold the funds on the trusts of the will.

Costs according to the Act.

Solicitors: *S. W. Johnson; Burchells.*

(1) 2 W. R. 111.

(2) Law Rep. 13 Eq. 564.

DONALDSON *v.* DONALDSON.

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1876

[1852 D. 91.]

July 22, 27.

Settlement by Will of Real Estate—Subsequent Settlement by Deed of Personal Estate on Corresponding Trusts—Personal Estate directed to be laid out in Purchase of Land to be held as Money—Rebuilding of Mansion-house allowed out of Accumulations for Twenty Years of Part of the Personal Estate.

Testator devised real estates in strict settlement, and directed his residuary personalty to be laid out in the purchase of lands to be settled to the same uses. After the date of the will, the testator executed a deed whereby he assigned specific personalty to a large amount to the same persons whom he named as the trustees and executors of his will, upon trusts (not referring to, but) corresponding with, and only in a remote contingency differing from, those of the will.

The mansion-house having been pulled down, and requiring to be rebuilt, the tenant for life proposed that, out of the specific personalty fund settled by the deed, £24,000 should be advanced to him to pay for the rebuilding, and that out of the same fund a sum of £40,000 should be set aside, and the dividends accumulated for twenty years, until an amount of £24,000 should be saved, with which the same fund should be recouped:—

Held, that the Court had jurisdiction to make the order.

PETITION.

Statement.

Thomas Hudson, by his will, dated the 29th of June, 1850, bequeathed certain specific chattels which should be in and about his mansion-house of *Cheswardine Hall, Salop*, to trustees (whom he also appointed executors) upon trust for his wife (who died in his lifetime) for life; and after her death he directed the same to be sold, and that the produce of such sale should belong to his residuary personal estate. He bequeathed all his residuary personal estate, after payment of debts, funeral and testamentary expenses and legacies, to the same trustees upon trust to convert and stand possessed of the same upon the trusts thereinafter declared. He devised all his real estate to the use of the same trustees and their heirs; and declared that his trustees should stand possessed of his said real estate and of his residuary personal estate upon trust to accumulate the rents, profits, and income thereof which should arise before the 1st of November, 1861, in augmentation of his personal estate. He directed his trustees from time to time, as occasion should require, to lay out and invest "all" his said

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residuary personal estate, and the funds produced by the accumulation thereinbefore directed, in the purchase of hereditaments in *England* or *Wales*, to be conveyed to his trustees, and to be subject to the same trusts as if the same had been part of his general real estate. He directed his trustees as soon as conveniently might be after the 1st of November, 1861, to cause all his real estate thereby devised, or which should be purchased under the trusts of his will, to be settled to the use of *Charles Donaldson Hudson* during his life without impeachment of waste, with remainder to the use of his first and other sons successively in tail male, remainder to the use of *Thomas Donaldson* for life, remainder to the use of the first and other sons of *Thomas Donaldson* successively in tail male, with divers remainders over, and an ultimate remainder to the use of the testator's right heirs.

By a settlement dated the 12th of April, 1852, and made between the above-named testator, *Thomas Hudson*, of the one part, and the three persons who were in the will and a codicil thereto named as the trustees thereof, of the other part, such parts of certain bonds, debentures, moneys, stocks, funds, and securities, mentioned or comprised in the schedule, as were not then effectually vested in the trustees, were assigned by *Thomas Hudson* to the same three persons upon trust as the said *Thomas Hudson* should by deed appoint, and in default of appointment upon trust to continue the investments, or sell and convert the same, and invest the proceeds as therein mentioned, and pay the income to *Thomas Hudson* for life; and after his death to raise certain annuities and other sums, and after his decease during the (then) minority of the said *C. D. Hudson*, to pay such portion of the income as they should think proper for the maintenance and education of *C. D. Hudson*, and when *C. D. Hudson* should have attained twenty-one, and thenceforth until he should attain thirty, should accumulate the unapplied portion of the income in manner therein mentioned, and stand possessed of the accumulations and income upon the trusts thereinafter declared of the residue of the trust premises, and the income thereof; and upon further trust, when and so soon as *C. D. Hudson* should have attained thirty, to pay the income of the trust premises to *C. D. Hudson* for life, and after his decease stand possessed of the trust premises and the income

thereof, upon trust for such son of *C. D. Hudson* as should first attain twenty-one, absolutely; and in case there should be no son of *C. D. Hudson* who should live to attain twenty-one, then upon like trusts for the benefit of *Thomas Donaldson* for life, and after his decease for such son of *Thomas Donaldson* as should first attain twenty-one; and if there should be no son of *C. D. Hudson* or *T. Donaldson* who should attain twenty-one, then upon certain other trusts in succession; and an ultimate trust for the persons who would upon the death of *Thomas Hudson* be entitled to his personal estate under the Statutes of Distribution in case he had died intestate. By the same deed the trustees were empowered to sell or dispose of any part of the stocks, funds, or securities for the time being subject to the trusts of the indenture, and lay out and invest the moneys in the purchase of real estate, to be conveyed to the trustees upon trust to sell, and to stand possessed of the proceeds of sale, and of the rents and profits thereof until sale, as if the same were money.

On the 14th of April, 1852, *Thomas Hudson* died.

On the 1st of August, 1854, a decree was made in the suit, which was instituted by *Charles Donaldson Hudson*, then a minor, against *Thomas Donaldson* and the other persons interested in remainder, and the trustees, declaring that the trusts of the will and indenture ought to be carried into execution, and directing accounts and inquiries.

The Defendant *Thomas Donaldson* died on the 13th of July, 1867, leaving an eldest son, *Walter Kirwan Donaldson*, now of the age of about twelve, and other sons.

On the 11th of February, 1870, the Plaintiff attained the age of thirty.

The property subject to the trusts of the will consisted of the site of the mansion-house of *Cheswardine Hall*, which since the testator's death had been pulled down, and real estates adjoining, and of other property producing together an income of about £3106 10*s.*; and the property subject to the trusts of the indenture consisted of particulars producing an income of about £17,463; the total income being now about £20,569 10*s.*

The Plaintiff was tenant for life of both properties. He had one son, *Ralph Charles Donaldson Hudson*, born on the 20th of

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February, 1874, who was first tenant in tail in remainder, and two daughters.

The present petition was presented by the Plaintiff, stating the above facts, and that the trusts of the will and settlement were "substantially" the same; also that the mansion-house at *Cheswardine Hall* had been proved to be small and inconvenient, and built upon insufficient foundations, and with defective materials; and that the Petitioner had been advised that it would be more prudent and less expensive in the end to pull down the existing house, sell the materials, and build a new one; that the Petitioner accordingly had caused the mansion to be pulled down and the materials to be sold, which had been done; that he had entered into a contract for the rebuilding of the mansion for a sum of £26,363; and that it was expected that certain contingent expenses would bring the total cost up to £30,000 or £31,000.

He then stated as follows:—

"Your Petitioner is willing and desirous that the whole expense of rebuilding the said mansion-house should be provided for out of the income of the trust estate, and he is willing to bear a substantial part of the expense himself without any assistance from the Court; but he is desirous and humbly submits that it will be right and proper and for the benefit of all parties interested in the said trust estate that some part of the expense should, as in the case of other permanent improvements, be spread over a period of years, and charged on the income of the trust estate.

"Your Petitioner submits that such a course would not only be beneficial to himself personally . . . but would also benefit the parties entitled in remainder by ensuring the completion of the said mansion-house; as in the event of the death of your Petitioner before such completion, there would be no fund available for the purpose of such completion."

The Petitioner accordingly proposed that the contract might be approved, he undertaking to provide for all sums which might be required for completing the house over and above £24,000; that for the purpose of providing £24,000 a sum of £40,000 stock, part of a sum of £226,481 4*s.* 6*d.* stock, being part of the property which was subject to the trusts of the indenture, should be carried

to a separate account to be intituled "The *Cheswardine Mansion-House* Accumulation Account," and the dividends accumulated for twenty years until the sum of £24,000 should have been made up; that in the meantime the sum of £24,000 should be advanced to the Petitioner out of the residue of the said sum of £226,481 4*s.* 6*d.* stock by four instalments of £6000, on satisfactory proof of the payment by the Petitioner, in accordance with the contract, of sums equivalent to such instalments; and that on the repayment to the indenture settlement account of the £24,000, the £40,000 stock should be retransferred to the same account.

Statement.

The petition stated that in the event of the Petitioner, who was now thirty-six years of age, living for twenty years, the whole burden of repaying the principal would fall on him, who was willing to assume such burden; and that in the event of his dying before the expiration of twenty years, the instalments would be nearly all paid up during the minority of his son *Ralph C. D. Hudson*, now only two years old, or in the event of his (the infant's) death under twenty-one, of any other son of the Petitioner who might take his place; and the first tenant in tail in possession would obtain the full benefit of the rebuilding of the mansion-house, subject to the payment of the instalments, if any, remaining unpaid on his coming into possession.

The Petitioner prayed for an order in the terms of the above proposal.

Argument.

Kay, Q.C., and *Reginald J. Cust*, for the Petitioner:—

That which the Petitioner asks is less than what was done by the Lords Justices in *Drake* v. *Trefusis* (1).

BACON, V.C.:—If the Petitioner lives for twenty years, he will at the end of that time have made a very handsome present to the estate. If he does not live, may not the case be met by insuring his life?

Kay:—If he insures his life against the twenty years, he will have to pay the premiums. We do not know what this amount will be.

The Acts commonly called the Mansion House Acts (27 & 28 Vict. c. 118; 33 & 34 Vict. c. 56) were referred to.

(1) Law Rep. 10 Ch. 364.

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H. Cadman Jones, for the eldest son of the Petitioner, one of the trustees, and most of the ulterior takers:—

I do not oppose the application. In all probability the arrangement will be greatly for the benefit of the infant.

But I am bound to point out that in *Drake* v. *Trefusis* (1) the trust was to lay out money in the purchase of lands to be settled to the like uses; hence the land and the money must have gone together; here there are two settlements, one of real estate, the other of personalty, and events may happen in which the realty will go one way and the personalty another.

Macnaghten, for other Respondents.

Judgment.

BACON, V.C.:—

If the tenant in tail in remainder were adult, there would be no difficulty. All I am asked to say is, whether in my opinion the arrangement will be for the benefit of this infant; and I have no hesitation in saying it will be for his benefit.

Upon the other point I think the Court has jurisdiction. The £40,000 is not abstracted from the fund, it is only temporarily removed in order to be replaced again. Building a mansion-house is not an "improvement" in the technical sense of the word; it is, in fact, an augmentation of the estate. There is a difference between this case and that of *Drake* v. *Trefusis*; but it is not such a difference as affects the question of jurisdiction.

There will be an order as prayed, unless a better mode of effecting the object, by way of insurance of the Petitioner's life, can be devised.

July 27. The case was again mentioned; and it was stated that on inquiry no satisfactory mode of carrying out the arrangement by insurance could be effected; whereupon

The VICE-CHANCELLOR made the order as prayed.

Solicitors: *Bowker, Peake, & Bird*; *Bennett, Dawson, & Bennett.*

(1) Law Rep. 10 Ch. 364.

HALL *v.* OLD TALARGOCH LEAD MINING COMPANY.

V.-C. B.
1876
July 27.

[1876 H. 185.]

Voluntary Winding-up—Action by Shareholder.

After resolutions had been passed and confirmed for the voluntary winding-up of a company, a shareholder, in ignorance thereof, commenced an action against the company and the directors to have his name removed from the register, for a rescission of his contract to take shares, on the ground of misrepresentations in the prospectus, and to obtain repayment of all moneys already paid, and an indemnity against future liability in respect of his shares:—

Held, that the relief asked in the action was not inconsistent with the winding-up; and a motion by the voluntary liquidator to stay all further proceedings in the action was refused with costs.

Statement.

MOTION on behalf of the Defendant company and the liquidator thereof under the voluntary winding-up, that all further proceedings against the Defendant company in this action might be restrained, either absolutely or until further order, as the Court should think fit.

In September, 1874, the Plaintiff applied for, and in December an allotment was made to him, of fifty shares, on which he had paid £250. By the statement of claim delivered in his action, Plaintiff alleged that the prospectus, on the faith of which he applied for shares, contained material misrepresentations. He also alleged that about the end of February and the beginning of March, 1876, he discovered the misrepresentations, and immediately repudiated the position of a shareholder, and applied to the Defendants, the directors, for a rescission of the contract, removal of his name from the register, and repayment of the £250 paid by him on allotment, and that the directors, in reply, asserted that the statements in the prospectus were true, and thereby delayed the Plaintiff in obtaining relief. On the 25th of February, 1876, resolutions were passed, and on the 15th of March confirmed, for a voluntary winding-up of the company.

On the 3rd of May, 1876, in ignorance (as he alleged) of these resolutions, the Plaintiff commenced this action against the company and the directors, claiming by his writ a declaration that he ought to be relieved from his position as a shareholder in the Defendant

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company, the rescission of the contract for the issue and acceptance of shares, the removal of his name from the register, and that the directors might be ordered to recoup to him all sums paid by him on account of the shares allotted to him in the company, and to indemnify him against all liability in respect of the said shares.

The liquidator, in his affidavit in support of the present motion, stated that the company was wholly insolvent, and that there were not sufficient assets for payment of the creditors.

Argument.

Sir *H. Jackson*, Q.C., and *Russell Roberts*, in support of the motion :—

This action, which can only result in useless costs being incurred, as the company is insolvent and any claim by the Plaintiff to repayment is subject to the rights of creditors, ought not to be allowed to proceed. By the *Companies Act*, 1862, s. 87, upon the order being made for a compulsory winding-up, all proceedings against the company without leave of the Court are stayed. The fact that the winding-up is voluntary does not give the Plaintiff any better right; the object of sect. 138, which enables the liquidators or the contributories in a voluntary winding-up to apply to the Court for a determination of any question, and for the exercise of all powers in the same way as if the company were being wound up by the Court, being to abolish any distinction between the jurisdiction of the Court in a voluntary and in a compulsory winding-up : *Buckley* on the Companies Act (1). If this application had been made in Chambers under sect. 87, the action would not have been allowed to proceed. The question of the liability of the Plaintiff, who was *de facto* a shareholder at the date of the winding-up, as a contributory (*Oakes* v. *Turquand* (2)) can be determined in the voluntary winding-up; and the claim for repayment being, from the state of the assets, hopeless, the action in its present form can have no other result than the incurring of costs. If allowed to proceed, the claim ought to be amended under Rules of Court, 1875, Order XVII., rr. 8, 9, by striking out the name of the company, so as to relieve the assets from costs of useless litigation, and making one of the directors a Defendant.

(1) Page 273. (2) Law Rep. 2 H. L. 325.

Kay, Q.C., and *W. Phipson Beale*, for the Plaintiff:— Argument.

The Plaintiff is entitled not only to have his name removed from the register of shareholders, but also, as against the directors, to repayment of his £250, notwithstanding the winding-up: *Henderson* v. *Lacon* (1). Order XVII., rules 8, 9, has nothing to do with the matter, being applicable to cases where, under the the old practice, a bill might have been demurred to as multifarious, and these rules cannot have the effect of rendering improper and irregular, and therefore staying, a suit which would have been proper and regular before the passing of the *Judicature Act*: *Henderson* v. *Lacon*. It is not pretended that the action is not regularly and properly constituted, but it is said that it must be stayed, because in the opinion of the liquidator there will not be assets sufficient to answer the claim of the Plaintiff if established. As to the voluntary winding-up, the fact that other relief is sought in addition to a removal of the Plaintiff's name from the register would be sufficient to prevent the stay of proceedings, even if the winding-up were compulsory or under supervision.

Sir *H. Jackson*, in reply.

BACON, V.C.:— Judgment.

I do not think I ought to interfere with this action, in which the Plaintiff does not ask more than he is entitled to require on the authority of *Henderson* v. *Lacon*. No relief is asked against the company beyond what the law allows, or which is inconsistent with the Winding-up Acts. The action is not against the company alone, but against the company and other persons; and this prevents me from dealing with it as I otherwise might. If the objection to the action had been raised in Chambers, I could not have dealt with the matter until the cause came on to be heard, as the question of the Plaintiff's right to repayment is inseparably connected with his case and the relief to which he claims to be entitled; and, as far as he knows, he can never obtain any substantial relief against the company in Chambers under the voluntary winding-up. The liquidator, it is true, might have a right to say, I told you at the commencement of the proceedings that useless costs were being incurred; and if after this intimation the

(1) Law Rep. 5 Eq. 249.

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Plaintiff chose to proceed, his doing so might have an important bearing on the question of the costs of the action. But I do not think that I ought to accede to this application, and I see no reason why the action should not be carried on in the way in which it has been framed. The motion is misconceived, and as an experiment it must be refused with costs.

Solicitors: *Kennedy, Hughes, & Kennedy; Sharp & Ullithorne*, agents for *Simpson & Hockin, Manchester.*

V.-C. B. 1876 *Aug.* 2.

BEVAN *v.* WATERHOUSE.

[1876 B. 262.]

Administration—Shares in a Company belonging to Testator at his Death—Shares allotted to and accepted by Testator's Trustees after his Death—Calls, whether payable out of Income or out of Capital.

Testator bequeathed residuary personalty to trustees, with permission to continue existing investments, upon trust to convert, and invest in, amongst other securities, the stock or shares of any company in *Great Britain*, and pay the income to a tenant for life, with remainder over. He declared that "the calls, if any, which at or after my decease may be or become due in respect of any shares for the time being constituting part of my residuary personal estate, shall be paid by" the trustees out of income, and not out of capital.

Testator at his death held waterworks and railway shares, upon which some instalments were due, but not yet payable.

After the testator's death the trustees sold some shares on which a call was actually payable, and allowed the brokers to retain the amount of the call out of the sale moneys, for the benefit of the purchaser.

After the testator's death the trustees accepted allotments of valuable shares offered to them in respect of their proprietorship in the company:—

Held, that the instalments due on shares accepted by the testator in his lifetime, when payable, and the amount of the call moneys deducted on the occasion of the sale, were calls within the meaning of the will, and hence payable out of income:

Held, further, that the shares accepted by the trustees did not constitute part of the testator's residuary personal estate at his death, and hence that the calls on such shares were payable out of capital.

SPECIAL CASE.

Statement.

Paul Bevan, who died on the 12th of June, 1868, by his will, dated the 2nd of February, 1866, bequeathed his residuary per-

sonal estate to trustees, whom he also appointed executors, upon trust either to permit so much of the said residuary personal estate as should at his decease be standing in or upon any investment or security whatsoever to continue in or upon such investment or security for any period which the trustees should think proper, or from time to time to sell, call in, and convert into money the said residuary personal estate; and after payment of debts, funeral and testamentary expenses and legacies, to invest the residue of the said moneys in their names in any of the parliamentary stocks or public funds of *Great Britain*, or at interest on government or real securities in *England*, *Wales*, or *India*, or in or upon the stock of the *Bank of England*, or the stocks or shares or the bonds or debentures of any canal, railway, dock, or other public company in *Great Britain* or *India*, with power to vary securities. He declared that the residuary trust moneys should be divided into three equal shares, and that the trustees should stand possessed of the three shares, upon trust as to one for the benefit of his daughter *Mary Waterhouse* for life, and afterwards of her children; as to a second, for the benefit of his son *William* for life, and afterwards of his children; and as to the third, for the benefit of his son *Samuel* for life, and afterwards of his children.

Testator declared as follows: "the calls (if any) which at or after my decease may be or become due in respect of any shares for the time being constituting part of my residuary personal estate in any railway or other public company, shall be paid by the said trustees or trustee for the time being out of the annual produce, and not out of the capital of my general residuary estate."

The testator had shortly before his death accepted an allotment of forty-six shares of £25 each in the *East London Waterworks Company*, which were offered to him in respect of stock in the company belonging to him. By a resolution of the proprietors it was provided that the £25 should be paid by five instalments, or calls, of £5 each, at intervals of six months; and that the proprietor might be at liberty on any day of payment to pay the whole or any of the instalments or calls in advance. All these calls were paid by the executors.

The testator had also in his lifetime accepted an allotment of

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ten shares of £12 10*s.* each in the *Maryport and Carlisle Railway Company*, which were offered to him as a proprietor of shares in the company. The amounts of these shares were by resolution of the proprietors made payable by four calls or instalments on the 1st of November, 1865; the 1st of October, 1866; the 1st of October, 1867; and the 1st of October, 1868. Thus the last of the four instalments was due at the testator's death, but was not then payable. When it became payable it was paid by the executors.

In 1871, ninety new shares of £3 each in the *Maryport and Carlisle Railway Company* were allotted to and accepted by the executors in respect of their holding in the company; and in 1873 a further allotment of twenty-seven shares of £10 each in the same company was made to and accepted by the executors, who paid all the calls.

All the above shares in the last-named company participated in the dividends declared on the ordinary stock and share capital of the company; and if they had been sold at their market value would have realized a premium.

On about the 12th of December, 1872, the executors sold eighty-five new shares of £10 each in the *Monmouthshire Railway and Canal Company*, at a premium of £1 5*s.* per share. At the time of the sale £5 per share had been paid, and a third call of £2 10*s.* was then due and payable. The shares were accordingly sold as having £7 10*s.* paid up, and the £2 10*s.* per share then due from the executors and not paid by them was allowed by the executors to be retained by the broker.

In 1874 an allotment of forty shares of £12 each in the same *Monmouthshire Railway and Canal Company* was made to and accepted by the executors, and the executors had paid the two first calls.

The Plaintiffs, the trustees and executors of the will, contended that all the above payments by the executors, including the amount deducted from the purchase-money of the shares sold as above-mentioned, should be made out of, and be charged to the capital of the testator's estate; the Defendants, the children of Mrs. *Waterhouse*, and of *William* and *Samuel Bevan*, contended that they should be made out of, and be charged to, income.

The questions were: 1. Whether, according to the true construction of the will, the calls paid by the executors after the testator's death on shares allotted to the testator in his lifetime, were payable out of the capital or out of the income of the testator's estate; and 2. Whether, according to the true construction of the will, the calls paid or to become payable upon the shares allotted to the executors, or upon any and which of them, were payable out of capital or income.

Argument.

Tremlett (*Kay*, Q.C., with him), for the Plaintiffs:—

With respect to the first class of shares, those which were allotted to the testator in his lifetime, the whole amount became due immediately on allotment. The payment by instalments was only matter of convenience. Deferred payments are not "calls" in the strict sense of the word, hence not "calls" within the meaning of the testator's direction. They are in the nature of a present debt, payable in future. Hence, like other debts, they are payable out of capital.

Judgment.

BACON, V.C.:—

Was it certain that the company would require all this capital? They might never have called it up. At any rate, the taking of these shares was an investment, which might have been made by a present payment. Having, however, been made payable by instalments, in my opinion those instalments are clearly enough within the direction of the testator's will. They were "calls" and nothing else. But on the other class of shares, I will hear what the other side has to say.

Argument.

Cozens-Hardy (Sir *H. Jackson*, Q.C., with him), for the Defendants:—

It is understood that your Lordship's decision covers the calls paid on the shares which were taken by the testator himself, and the call-moneys which were payable, but had not been paid, by the executors on the occasion of the sale.

Must not the decision extend to the shares which were taken by the executors? The words are "any shares for the time being constituting part of my residuary personal estate." Is it not the

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plain, natural, and almost necessary construction, that calls on shares allotted to and taken by executors, fall within this description? Must not the tenant for life take his life estate subject to the payment for this property? Actually the shares do at this moment constitute part of the residuary personal estate.

Gregory, for infants in the same interest:—

The right to take these shares was a valuable property. It was not an *onus*. The allotment letter was of considerable value. Was not the value of this letter part of the residuary personal estate? If so, were not the calls which afterwards became due payable out of the estate?

Judgment.

BACON, V.C.:—

In my opinion the two things are totally different.

The testator has directed that the calls which, after his decease, may be or become due "in respect of any shares for the time being constituting part of my residuary personal estate," shall be paid out of income, and not out of capital.

What he means by that is, "my residuary personal estate at my death." He means to say, "If when my residuary personal estate comes to be realized, it is found that I have not paid all the calls that may be then due, then whenever they may be called for, they shall be paid out of income."

He says nothing whatever about subsequent acquisitions. Then the executors find an opportunity of investing in the purchase of these shares. It is optional with them whether they will accept the offer of allotment or not. They might have said, "We will have nothing to do with your new issue." But they exercise an option, and they choose to take them. That is a totally new transaction, to which the words of the will have, in my opinion, no application. Though by resting on the words of the clause you may derive that meaning from it, though that may be the literal construction of the words, I think what the testator means is, "The debt which I have contracted shall be paid out of income; I direct the executors so to pay it; whether they pay the money down, or distribute it over a number of years, it is part of

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the purchase-money for the estate which has been bought for the enjoyment of the tenant for life."

The rule which applies to one case does not, in my opinion, apply to the other.

Hence the answers to the questions will be that the calls on the shares which belonged to the testator at his death, including the call which was deducted from the sale moneys of the *Monmouthshire Railway and Canal* shares, are payable out of income; and that the calls on shares and stock which were accepted by the trustees and executors are payable out of capital.

The costs of all parties will come out of the estate.

Solicitors: *Bevan & Whitting; Waterhouse & Winterbotham.*

In re MEREDITH'S TRUSTS.

V.-C. B.
1876
Aug. 2.

Power of Appointment—Legacy under Will in exercise of Power void for Excess —Void Legacy not undisposed of but falling into Residue.

Under an exclusive power to appoint to children, the children being entitled in default of appointment in equal shares, the donee, by will, appointed the whole fund to trustees, upon trust as to £1200, to pay the income to one of her children, *J.*, for life, and after his death, for his children; and if *J.* should die without leaving children who should attain vested interests, then that the £1200 should be "added to and form part of the residue of" the trust estate. The trusts of the residue were in favour of daughters for life with testamentary powers. *J.* died leaving children.

It being admitted that the gift to *J.*'s children was excessive:—

Held, that on *J.*'s death the £1200 was not undisposed of, but was well appointed by the residuary gift.

PETITION.

Statement.

By a marriage settlement dated the 8th day of June, 1814, a sum of stock was settled upon trust for *Mary*, shortly afterwards the wife of *John Meredith*, for life, and after her decease in trust for "all and every or such one or more" of her children as she should by deed or will appoint; and in default of appointment, to all her children in equal shares; and the settlement contained a hotchpot clause.

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In re MEREDITH'S TRUSTS.
Statement.

Mary Meredith died on the 3rd of January, 1860, having by will dated the 16th of April, 1858, purporting to be made in exercise of the power, appointed that after her decease the trustees should stand possessed of the property to which the power extended, upon trust to convert, and pay over the whole of the proceeds to two other trustees, upon trust in the first place to pay three pecuniary legacies to three of her children respectively, and upon further trust to invest in the names of her (testatrix's) trustees the sum of £1200, and pay the annual income thereof to her son *John* for life, and after his death in trust for all the children of the said *John* in equal shares. And in case the said *John* should die without leaving any child or children who being a son or sons should attain twenty-one, or being a daughter or daughters should attain that age or marry, then testatrix directed that the said sum of £1200 should "be added to and form part of the residue of" her trust estate. She then directed her trustees to invest in their names another sum of £1200, and pay the income to her daughter *Anne Jane Billington* for life, and after her death to stand possessed in trust for all the children and remoter issue of *Anne Jane Billington, per stirpes*, in equal shares. And in case the said *Anne J. Billington* should die without leaving any child or remoter issue, who being a son should attain twenty-one, or being a daughter should attain twenty-one or marry, testatrix directed that the said sum of £1200 should "be added to and form part of" her said trust estate; and upon further trust as to the residue of the said trust estates, to divide the same into two equal portions, and as to one of such portions, to invest the same in the names of the said trustees, and pay the annual income thereof unto her daughter *Margaret Meredith* during her life, and after her decease in trust for such person or persons and in such manner as the said *Margaret Meredith* should by deed or will appoint; and in default of appointment, in trust for her children as therein mentioned; and upon further trust, as to the remaining half-part or share of the said residue, in trust to invest the same and apply the income arising from such remaining half-part for the benefit of her daughter *Mary Emily Meredith*, her children and appointees, and ultimately to dispose of the principal in the manner thereinbefore

directed concerning the one half-part or share to be vested for the benefit of the said *Margaret Meredith.*

Mary Meredith had nine children, namely, *David, Thomas Orton,* the said *John, Elizabeth, Maria Louisa,* the said *Margaret,* the said *Anne Jane Billington,* afterwards and now *Anne Jane Bolver,* the said *Mary Emily,* and *Martha.*

By a deed-poll dated the 30th of July, 1860, under the hands of *Margaret Meredith* and *Mary Emily Meredith, Margaret,* in exercise of the power given to her by the will, appointed that after her own decease the half-part or share which she had power to appoint of the residue of the trust estates by the will appointed, including particularly in such residue the said sums of £1200 and £1200, subject only to the life interests in the income thereof respectively of the said *John Meredith* and *Anne Jane Billington* respectively, should go, remain, and be in trust for her the said *Margaret Meredith,* her heirs, executors, and administrators respectively; and *Mary Emily Meredith* in like manner appointed that after her own decease the half-part or share which she had power to appoint of the residue of the trust estates (following the same form of words) should go, remain, and be in trust for her the said *Mary Emily Meredith,* her heirs, executors, and administrators respectively.

On the 14th of April, 1874, *John Meredith,* the son, died, leaving several children.

It was admitted that the appointment by *Mary Meredith's* will, so far as it extended to the children of *John Meredith,* was bad for excess; but the question arose whether, on the death of *John Meredith,* the £1200 fell by the operation of the will into the residue of *Mary Meredith's* trust estate, or was undisposed of, and passed under the marriage settlement to the children of *Mary Meredith* in equal shares; and so also as to the other sum of £1200.

A prior question was raised on behalf of the children of *Mary Meredith.* It was argued that the appointment by the will of one moiety of the residue, so far as it extended after *Margaret's* decease to a trust for such persons as she should by deed or will appoint—was bad for remoteness, and so also as to the appointment of the other moiety.

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In re MEREDITH'S TRUSTS.

Argument.

Kay, Q.C., and *Chapman Barber*, for the Petitioner, the executor of *Margaret* and also of *Mary Emily Meredith* :—

Upon the first question, the gift here is a direction to pay to *Margaret* for life, and then a trust for such persons as she shall "by deed or will" appoint. That this is a good execution of a power to appoint to *Margaret* appears from *Falkner* v. *Butler* (1); *Bray* v. *Bree* (2); *Phipson* v. *Turner* (3); *Wollaston* v. *King* (4); *Slark* v. *Dakyns* (5).

Then as to the second question, namely, what became of the £1200 on the death of *John*, whether it fell into the residue under the will, or was undisposed of—we say it fell into the residue; and rely upon *Oke* v. *Heath* (6) and *Falkner* v. *Butler*.

Sir *H. Jackson*, Q.C., and *Jemmett*, for the legal personal representatives of *David Meredith* and of *Maria Louisa Meredith*, afterwards *Elias*, respectively, after some discussion, admitted the validity of the residuary gifts :—

As to the question whether the £1200 falls into residue, the will itself declares that the falling into residue shall be contingent on a particular event, which event has not happened. Whenever this is the case, the general rule that gifts which fail fall into residue is excluded by the testator's own language. The event upon which alone the £1200 was to fall into the residue is by the will declared to be the death of *John* without children who shall attain twenty-one or marry. But *John* died leaving children —hence the £1200 is excluded from falling into the residue, and is unappointed: *Ratcliffe* v. *Hampson* (7); *Easum* v. *Appleford* (8).

In *Brudenell* v. *Elwes* (9) it was held that failure of an intermediate gift will not accelerate the subsequent gift. Hence every limitation of the £1200 after the life estate given to *John* is void.

Kekewich, for the legal personal representatives of *John Meredith*.

Fellows, for *Anne Jane Bolver*.

(1) Amb. 514.
(2) 2 Cl. & F. 453.
(3) 9 Sim. 227.
(4) Law Rep. 8 Eq. 165.
(5) Ibid. 15 Eq. 307; Ibid. 10 Ch. 35.
(6) 1 Ves. Sen. 135.
(7) 1 Jur. (N.S.) 1104.
(8) 10 Sim. 274; 5 My. & Cr. 56.
(9) 1 East, 442.

Dunning, for another child of *Mary Meredith* :—

Margaret's power of appointment never extended to the £1200: *Page* v. *Leapingwell* (1).

The following remarks of Lord *Hatherley* in *In re Harries' Trust* (2), although the decision went the other way, govern this case (3): "If there is a definite fund subject to a power of appointment by will, and a will purporting to be made in exercise of that power, and appointing one sum, part of the fund, to one person, and another sum, other part of it, to another, and 'all the rest,' or 'all the remainder' of the fund to a third, then, according to *Easum* v. *Appleford* (4), the third appointee cannot claim any share which may lapse in consequence of the death of either of the former appointees in the lifetime of the testator." Here the failure is not owing to lapse from death, it is owing to excessive appointment; but the principle remains.

Kay, in reply :—

All *Page* v. *Leapingwell* means is, that where out of a fund fixed amounts are given, and the rest of the fund is given as residue, the rest of the fund is as much a fixed amount as any other, and is not to be added to by lapse. *In re Harries' Trust* follows and confirms this.

BACON, V.C. :—

There remains only one question to be decided in this case.

It arises upon the exercise by the will of *Mary Meredith* of a power of appointment given to her by her marriage settlement.

Mr. *Dunning* has produced one of the most recent cases on the subject, and it appears that the decision in that case does really govern the present wholly, as matter of law.

The question of construction, then, which it is my present duty to decide, scarcely arises. It can hardly be called a question at all; and I might be content to rest my decision upon the authority of this very case of *In re Harries' Trust*.

[His Lordship read the terms of *Mary Meredith's* will, observing

(1) 18 Ves. 463.
(2) Joh. 199.
(3) Joh. 204.
(4) 10 Sim. 274; 5 My. & Cr. 56.

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that the testatrix, the donee of the power, expressed herself as dealing with one entire thing, viz., the whole of the property to which the power extended; and continued:—]

She gives the income of £1200 to *John* for life, and after his death, in trust for his children, a gift which it cannot be disputed is invalid. She then says that if *John* should die without leaving children the £1200 "shall be added to and form part of the residue of my trust estate." What I am asked to do is practically to read the will as if these words were not in it. How is it possible to read these words as not being governed by that canon of construction which is laid down by the highest authority in the cases that have been cited?

The case is absolutely clear after the decisions in *Oke* v. *Heath* (1) and *Falkner* v. *Butler* (2); and if I had not these authorities to guide me, I should say, upon the construction of this will, there can be no reasonable doubt.

The single case which seems to interfere with this conclusion is *Ratcliffe* v. *Hampson* (3); but inasmuch as it does not apply to the point so directly as to oblige me to follow it, I pass it over, with the observation that it does not appear to me clear that *Ratcliffe* v. *Hampson* would be followed if it were submitted to a higher authority.

I have no doubt that upon the true construction of the will the two sums of £1200 do, upon the deaths of the respective tenants for life, fall into the residue of the testatrix's trust estate.

The order will be as prayed; the costs of all parties coming out of the estate.

Solicitors: *Meredith, Roberts, & Miles; Field, Roscoe, & Co.*, agents for *Atkinson & Co., Manchester; Gregory, Rowcliffes, & Rawle.*

(1) 1 Ves. Sen. 135. (2) Amb. 514.
(3) 1 Jur. (N.S.) 1104.

MOASE *v.* WHITE.

V.-C. B.

1876

Aug. 2.

[1875 M. 24.]

Will—Devise of "Real Estate"—Leaseholds—Contrary Intention—Wills Act (1 Vict. c. 26), s. 26.

Testator devised and bequeathed the residue of his real and personal estate upon trust to convert his residuary personal estate, "except leaseholds," and out of the income of the investments and the rents and profits of the real estate to pay certain annuities, and accumulate the residue of the income during his wife's life; and after her death upon trust as to all his "real estate" at, in, or near *E.*, and in or near *W.*, out of the rents and profits during the life of *J. T. W.* to repair and insure, and to pay an annuity, and subject thereto in trust for *J. T. W.* and his assigns for life, and after his decease for his first and other sons successively in tail male, with remainder to his daughters equally as tenants in common in tail, with limitations over in the nature of cross remainders.

Testator had both freeholds and leaseholds for a term of 1000 years at *E.*; at *W.* he had leaseholds only, for a term of 900 years:—

Held, that the leaseholds at *E.* and also at *W.* passed under the above devise, the exception of leaseholds in the gift of residue not shewing a contrary intention.

FURTHER CONSIDERATION.

Statement.

Henry Court, of *Midhurst*, who died on the 3rd of October, 1874, by his will dated the 20th of February, 1874, after bequeathing specific chattels to his wife, and devising the messuage, garden, lands, and hereditaments then in his own occupation at *Midhurst*, to his wife for life, gave out of his pure personal estate a charitable legacy, and bequeathed an annuity and several pecuniary legacies. He devised, after the decease of his wife, all his messuage and garden at *Midhurst*, then in the occupation of *John Caizley Gosden*, to *Emily Jane Moase*. He then devised and bequeathed all the residue of his real and personal estate to *Alfred Thomas Purser* and *Maurice Moase*, upon trust to get in and convert "my said residuary personal estate (except leaseholds)" into money, and invest the produce, and "out of the income of the said residuary personal estate, produce, and investments, and the rents and profits of my real estate," to pay an annuity of £80 to his wife for life, and the annuity before given, and to accumulate the residue "of such income and rents and profits" for twenty-one years, if his wife

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should so long live; and after her death, "upon trust as to all my real estate situate at, in, or near *Emsworth*, in the county of *Southampton*, and in or near *Westbourne* in the said county of *Sussex*," out of the rents and profits: during the life of *James Thomas White* to repair and insure, and to pay an annuity of £20 to *Anne*, widow of *James Court White;* and subject thereto in trust for *James Thomas White* and his assigns for life, and after his decease in trust for the first and other sons successively of *James Thomas White*, and the heirs of the body of each such son, and, failing such issue, in trust for the daughters of *James Thomas White* equally as tenants in common, and the heirs of their respective bodies, with trust limitations in the nature of cross remainders. He continued: "And as to my leasehold messuages, lands, and hereditaments now in my own occupation," and in the occupation of *William Shotter*, at *Midhurst* aforesaid, upon trust out of the rents and profits during the life of *James T. White*, to repair and insure, and subject thereto upon trust to permit the same to be enjoyed "as nearly as the differences in tenure will allow, according to the limitations and provisions thereinbefore contained concerning my real estate at *Emsworth* and *Westbourne* hereinbefore devised," but so that his leasehold tenements held for years should be subject to an existing limitation over on the death of any tenant in tail by purchase of any freehold hereditaments under the age of twenty-one years without leaving issue in tail living. From and after the decease of his wife, he directed that his trustees should sell and dispose of "the residue of my real estate, including the residue of my leasehold estate," and should stand possessed of the produce thereof, and of the sale and conversion of his residuary personalty, upon trust for the children of his late sister, *Elizabeth Purser*, as therein mentioned. The testator appointed *James Thomas White*, *Alfred Thomas Purser*, and *Maurice Moase* his executors.

The suit was instituted by the children of *Elizabeth Purser* against *J. T. White*, *A. T. Purser*, and *M. Moase*, for administration.

The Chief Clerk by his certificate found that the testator was at the time of his death seised of freehold property at *Emsworth*, and possessed of leaseholds there, for a term of 1000 years from the 18th of May, 1836, and was not seised of any freeholds at

Westbourne, but was possessed of leaseholds at *Westbourne* held on a lease for 900 years from the 20th of February, the 24th of *Elizabeth*. He reserved the question of whether the leaseholds at *Emsworth* and in or near *Westbourne*, or either of them, were included in the above devise.

Argument.

Sir *H. Jackson*, Q.C., and *Freeman*, for the Plaintiffs:—

The leaseholds did not pass under the devise of "all my real estate." The question is one of intention. Sect. 26 (1) of the *Wills Act* does not apply if a contrary intention appears by the will.

The expression "my personal estate except leaseholds" shews that the testator considered leaseholds to be personal, not real, estate. Then he gives the *Emsworth* and *Westbourne* property in a series of limitations, which are applicable to freeholds only; and in dealing with property expressly and admittedly leasehold, he settles it upon limitations by reference, "as nearly as the differences in tenure will allow," to the "real estate" at *Emsworth* and *Westbourne*, thereby shewing that by real estate he meant a different tenure to leasehold, namely, freehold.

In *Emuss* v. *Smith* (2), by a will before the *Wills Act*, freeholds were devised as freehold. With the freeholds was a small piece of leasehold. By a codicil after the 1st of January, 1838, the will was brought under the operation of the *Wills Act*. After the codicil the testator acquired the fee in the leasehold; but even in this case, and notwithstanding sect. 24 of the *Wills Act*, the leasehold was held not to have passed.

Kay, Q.C., and *F. G. Wood*, for the Defendant *James Thomas White*; and *F. G. Wood* for the other Defendants:—

It is admitted that but for contrary intention the words "real

(1) Sect. 26 of the *Wills Act* is as follows:—

"A devise of the land of the testator, or of the land of the testator in any place . . . . or otherwise described in a general manner, and any other general devise which would describe a . . . leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the leasehold estates . . . . to which such description shall extend . . . . as well as freehold estates, unless a contrary intention shall appear by the will."

(2) 2 De G. & Sm. 722.

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estate" will pass leaseholds. What, then, was the intention? The testator desires that out of the income of the residuary personalty, exclusive of leaseholds, "and" out of "the rents and profits" of his "real estate," annuities were to be paid. Is it reasonable to suppose he did not mean the annuities to come out of the income of the leaseholds as well as of the freeholds? No doubt the real estate at *Emsworth* and *Westbourne* is limited as freehold, and it is referred to as if it were freehold; but at *Emsworth* there is freehold estate which will answer both conditions. The effect of the statute is to alter the presumption. Formerly the presumption was that real estate would not carry leaseholds; now the presumption is that it will.

Hence, in this instance, contrary intention being out of the way, the statute applies—as to the property at *Westbourne* indisputably, even under the old law, for at *Westbourne* there is no freehold—and as to the property at *Emsworth*, under the statute.

Sir *H. Jackson*, in reply.

Judgment.

BACON, V.C., after reading the words of the statute, the finding of the Chief Clerk, and the language of the will, and observing on the length of the terms of the leaseholds, continued:—

The testator appears to have intended to give all his property at *Emsworth* and *Westbourne* as an entire thing.

I cannot entertain any doubt that the leaseholds at *Emsworth*, and also the leaseholds at *Westbourne*, passed by this devise.

Declaration accordingly.

Solicitors: *Rogerson & Ford.*

CORNMELL *v.* KEITH.

V.-C. H.

1876

March 14, 15.

[1875 C. 260.]

Marriage Settlement—Covenant to settle—Present and Future Property—Contingent Reversionary Interest.

Covenant in marriage settlement to settle property to which the wife then was or she or her husband in her right should during the coverture become entitled.

At the date of the settlement a trust fund stood so limited that on the death of the wife without issue one moiety thereof would belong to her, subject to the life interest therein of her husband, as her share of an intestate's estate:—

Held, that the wife's contingent reversionary interest in this fund was bound by the covenant.

6 Ch. D. 621
625.

CAUSE FOR TRIAL.

Statement.

By an indenture of settlement made in December, 1852, on the marriage of *Mary Jane Carruthers* with *James Buchanan*, certain property of *Mary Jane* in possession was settled upon trusts for or for the benefit of *Mary Jane* for life, and after her death for the benefit of her child or children, if any, and if there should be no child, then, in case *Mary Jane* should die in the lifetime of *James Buchanan*, upon trust for *Charles Bladen Carruthers*, his heirs, executors, administrators, and assigns absolutely; and *James Buchanan* and *Mary Jane* jointly for themselves, their heirs, executors, and administrators, and each of them separately for himself and herself, his and her heirs, executors, and administrators covenanted with the trustees, their executors and administrators, "that if the said *Mary Jane Carruthers* now is, or if at any time or times during the said intended coverture the said *Mary Jane Carruthers* or the said *James Buchanan* in her right shall become entitled by gift, descent, succession, or otherwise howsoever to any real or personal estate, property, or effects of the value or to the amount of £100 or upwards at any one time (other than and except interests which are or shall be restricted to the life of *Mary Jane Carruthers*, or which, whether so restricted or not, are or shall be settled and limited to her separate use and disposal) the same shall be forthwith at the costs of the trust estate conveyed, transferred, assured,

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and paid to the trustees for the time being of the settlement upon the trusts declared concerning the property settled and assured by *Mary Jane Carruthers*, or such of them as shall be subsisting or capable of taking effect, or as near thereto as the natures and qualities of the said property respectively will admit."

At the date of the settlement *Charles Bladen Carruthers* was entitled in remainder expectant on the death of *Mary Jane* without issue, and subject to the life interest therein of *James Buchanan*, to a trust fund of about £7500 consols as the legal personal representative of *M. W. Carruthers*, an intestate then deceased. The beneficial interest in the intestate's estate then belonged to *Charles Bladen Carruthers* and *Mary Jane*, in equal shares.

Mary Jane died on the 1st of September, 1869, without having had any child.

Charles Bladen Carruthers died on the 29th of September, 1869, having by will appointed the Plaintiffs the trustees and executors thereof.

James Buchanan died on the 2nd of June, 1875, having by will appointed the Defendants executors thereof.

The question was whether the fund was bound by the covenant.

Argument.

Dickinson, Q.C., and *Millar*, for the Plaintiffs:—

The only question is, what is the true construction of this covenant? At the date of the settlement and time of the marriage, this was an interest which was reversionary and contingent, and it is submitted that such a covenant applies to such an interest, and that it was assignable.

[HALL, V.C., referred to the case of *Grafftey* v. *Humpage* (1).]

That case is not entirely in point; it is, in fact, not so strong as the present. In *Dering* v. *Kynaston* (2) the question decided was that a mere contingent interest was not included in a covenant to assign and settle "all other the property of every kind of or to which" the lady "then was or should thereafter be or become possessed, interested, or entitled." That was a case of real estate. That case will probably be referred to as being against the Plain-

(1) 1 Beav. 46. (2) Law Rep. 6 Eq. 210.

tiffs, but it really is an authority in their favour, as it shews that there is no objection to the interest being reversionary. The decisions in the cases of *Re Hughes' Trusts* (1), *In re Viant's Settlement Trusts* (2), which was a very strong case, *In re Pedder's Settlement Trusts* (3), which is capable of being reconciled with the decision in *Re Hughes' Trusts*, *In re Clinton's Trusts* (4), and *In re Mackenzie's Settlement* (5), are in favour of the Plaintiffs' contention.

[They also referred to *Atcherley* v. *Du Moulin* (6), and *Caldwell* v. *Fellowes* (7).]

Eddis, Q.C., and *F. A. Lewin*, for the Defendants:—

In this settlement the husband, wife, and children were purchasers of the fund in question, which was placed in a peculiar position, as it could not fall into possession until the death of husband and wife without issue of the marriage; therefore, until every person who was a purchaser under the settlement was dead, no one could take. No doubt *C. B. Carruthers* was the wife's next of kin at her death. He was, however, a mere volunteer under this settlement, and a stranger to the consideration of marriage. There is no recital in the settlement to restrain the covenant. The theory is that this particular fund is subject to the trusts of the settlement, but it is submitted that that cannot be, as that would be to give effect to this voluntary trust. The intention of such a covenant is to prevent the marital right of the husband from attaching, but in this case it never could arise. There could be no change affecting this fund during the coverture. The husband never could exercise any marital right over it. The case of *Dering* v. *Kynaston* (8) is a precise authority in the Defendants' favour; and the decision in *Atcherley* v. *Du Moulin* is also distinctly in point. The cases of *Hoare* v. *Hornby* (9), where Vice-Chancellor *Knight Bruce* commented upon the decision in *Grafftey* v. *Humpage* (10), as did Vice-Chancellor *Wickens* in *In re Clinton's*

(1) 4 Giff. 432.
(2) Law Rep. 18 Eq. 436.
(3) Ibid. 10 Eq. 585—588.
(4) Ibid. 13 Eq. 295.
(5) Ibid. 2 Ch. 345.
(6) 2 K. & J. 186.
(7) Law Rep. 9 Eq. 410.
(8) Ibid. 6 Eq. 210.
(9) 2 Y. & C. Ch. 121.
(10) 1 Beav. 46.

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Trusts (1), and *In re Edwards* (2), are also in favour of the Defendants' contention. *Grafftey* v. *Humpage* (3) and *Re Hughes' Trusts* (4) cannot be reconciled with those cases. *In re Mackenzie's Settlement* (5) was a very different case from the present. That was a strong case, and, as in that, so the words in the other cases cited could hardly have suggested a doubt in the mind of any judge. The question is, what was the intention of the parties about to be married in reference to the funds which they might be entitled to, but not mentioned in the settlement? Did they intend to include contingent interests, and that neither the parents nor the children should touch them, but that they should go to a volunteer. It is quite clear that the parties could not have intended that this particular fund should be subject to the settlement, which was made for the benefit of the wife and children. The language of this covenant shews that interests which could not fall in during the coverture were not intended to be included in it. It could not apply to interests which could not accrue during the trusts, and be transferred forthwith to the trustees. The case being completely governed by the decisions in *Dering* v. *Kynaston* (6) and *Atcherley* v. *Du Moulin* (7), a declaration cannot be made in favour of the Plaintiffs without overruling those cases.

Dickinson, in reply:—

This case shews the wisdom of Vice-Chancellor *Wickens'* observations in *In re Clinton's Trusts*. The difficulty felt has been raised in consequence of not following the words to be construed; and in guessing at the intention. The case resolved itself into a comparison of two classes of cases: the one where the words "now is" are to be found, and the other in which they are not. The words here are large enough to sweep in every interest of the wife. The husband survived his wife for some years, and yet he never instituted any proceedings to recover the fund.

Judgment.

HALL, V.C.:—

I have had an opportunity of further looking at the cases which

(1) Law Rep. 13 Eq. 295.
(2) Ibid. 9 Ch. 97.
(3) 1 Beav. 46.
(4) 4 Giff. 432.
(5) Law Rep. 2 Ch. 345.
(6) Ibid. 6 Eq. 210.
(7) 2 K. & J. 186.

were referred to yesterday, and it appears to me that the Plaintiffs are entitled to a declaration that this fund belongs to them.

How would the matter stand if I were construing the settlement irrespective of the authorities? The settlement deals, in the first place, with certain funds which the wife had in possession, and which, no doubt, were transferred to the trustees when the deed was executed, or immediately afterwards, and held upon trusts in which the husband had no interest whatever. The husband brought nothing, as I understand, into settlement. The intention of the settlement was to protect the wife only, and the trusts are for the benefit of children of this marriage only.

The question which has arisen is whether the fund mentioned in the bill comes within the scope of the covenant. Was it in the same position as the property which was specifically settled. If it were not included the husband would take it as the legal personal representative of his wife. If I had to consider probabilities, nothing, as it seems to me, would be more improbable than that this fund, not specifically settled, but which on the happening of certain events would fall into possession, should not be liable to be disposed of by the wife—even though it should not fall into possession until after her death—that though the husband should not be entitled to anything out of the present fortune, yet that something should be left derelict, and be taken by him as the legal personal representative of his wife. The covenant was a contract by both husband and wife jointly, and by each separately with the trustees of the settlement that if the wife then was, or if at any time should become—but I may leave the latter words out of consideration—entitled to any real or personal property of the value or to the amount of £100 or upwards at any one time it should be transferred to the trustees upon the trusts declared. I may observe, that as to the words, of the value or to the amount of £100 or upwards, it has been decided that they do not mean the actual value of the thing if reversionary, but the property as if in possession, *i.e.*, considering it as if in possession though in fact in reversion. The covenant is a contract that such real and personal property as the wife then was entitled to should be settled, and I apprehend that according to the ordinary construction of language

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this reversionary interest was personal property to which she was entitled. It should be observed, that there was an exception from the settlement of the wife's property settled and limited to her separate use and disposal.

The object of the settlement being merely to exclude the marital right of the husband, it would be extremely improbable that the wife should not deal with any reversionary interest, and exclude his marital right. The trusts were for the wife for her life, and for her children, but failing them (an event which happened) or her predeceasing her husband, for her only surviving brother, *Charles Bladen Carruthers*, and sole next of kin, and not for next of kin generally. The brother, *Charles B. Carruthers*, was as much the object of the marriage contract as the wife and children were; therefore there is nothing in the argument that these trusts being for a person not within the scope of the consideration of marriage, the settlement was for that reason and to that extent bad. The covenant is that the property should be forthwith assured to the trustees. That is not inconsistent with including anything that was in reversion. The assurance might be effected as conveniently after the marriage as before. Supposing the fund had not fallen into possession until after the wife's death, could it be doubted that it would be subject to the trusts in favour of the children? It is manifest therefore that the covenant applies to property which from its nature would not and could not be subject to all the trusts, but to such of them as were subsisting or capable of taking effect. And there being a trust in favour of *Charles B. Carruthers*, in consequence of the failure of the preceding trusts, why should it not fall within the words "subsisting or capable of taking effect"? So to hold would be clearly within the scope and spirit of that trust. The words may be interpreted to mean that regard must be had to the nature and quality of the property, and whether it was real or personal, which had become subject to the trusts, and whether it was reversionary or contingent. That is the proper construction. But I do not think it necessary to rest my judgment upon that. Having regard to the special language of this covenant, it appears to me that this case might be decided without reference to any of the authorities.

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I cannot, however, pass over the cases without some observations. In *Atcherley* v. *Du Moulin* (1) the language is not the same as in this case. In *Dering* v. *Kynaston* (2) the covenant was one of a remarkable character, and the decision is not applicable to this case. *Caldwell* v. *Fellowes* (3) is an express authority, and so is *In re Mackenzie's Settlement* (4)—a case in which the question of value is considered—in favour of the Plaintiffs' contention. The decision in *In re Pedder's Settlement Trusts* (5) was quite consistent with previous decisions, and so was the decision in *In re Clinton's Trusts* (6). It appears to me that the Plaintiffs, as the executors of *C. B. Carruthers*, are entitled beneficially, and there must be a declaration to that effect, and an order that the costs must be paid as between solicitor and client out of the fund. I may take this opportunity of stating that I am by no means disposed to put a narrow construction upon covenants like this. Conveyancers have struggled to make them sweep in every kind of property, and the form of the covenant has from time to time been added to to accomplish that object.

66 L. D. 625

Solicitors: *Walton, Bubb, & Walton; Lewin & Son*, agents for *Daubeny & Wilson, Bath.*

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[1869 C. 163.]

Will—Gift to "Children" of Testator's Daughter—Illegitimate Child en Ventre sa Mère at date of Will and of Testator's Death.

A bequest in favour of a woman's illegitimate child *en ventre sa mère* at the date of the will though not born until after the testator's death, is not contrary to public policy.

A testator, whose daughter *M.* had with his knowledge gone through the ceremony of marriage with *J. C.*, her deceased sister's husband, and had had two children by him, made his will at a time when he knew she was again *enceinte.* He thereby gave leaseholds to trustees on trust for "my daughter

(1) 2 K. & J. 186.
(2) Law Rep. 6 Eq. 210.
(3) Ibid. 9 Eq. 410.
(4) Law Rep. 2 Ch. 345.
(5) Ibid. 10 Eq. 585—588.
(6) Ibid. 13 Eq. 295.

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M., the wife of *J. C.*," for her life, with remainder to "the child or children of my said daughter *M. C.*" as she should appoint, and in default for her child or children equally, and if none, then over. The testator died three months before the third child was born. *M.* appointed to the two children born at the date of the will, the child of which she was then *enceinte*, and a fourth child begotten and born after the testator's death.

The House of Lords having decided that the two children born at the date of the will were sufficiently designated, and that they took under the gift in the will:—

Held, that the child *en ventre sa mère* at the date of the will also took under the gift, but that the child begotten and born after the testator's death could not take.

Statement.

FURTHER CONSIDERATION.

The question now argued was whether an illegitimate child, the offspring of the marriage of a lady with her deceased sister's husband, and *en ventre sa mère* at the date of the will and of the death of the lady's father, was entitled to share the benefit of gifts in favour of the lady's "child or children" contained in the will.

It had already been decided in the same case that the illegitimate children of the lady who were the offspring of the same marriage and were born before the date of the will were so entitled (1).

John Hill, by his will, dated the 9th of March, 1859, forgave his "son-in-law *John Crook*" all sums of money due from him, and bequeathed to trustees certain leasehold messuages upon trust, during such part of his estate or term therein as his "daughter *Mary*, the wife of the said *John Crook*," should live, to pay the rents to her for her separate use, independent of "her present or any after-taken husband," and subject thereto he declared that after her death the said hereditaments should be held upon such trusts for the benefit of all and every or such one or more, exclusively of the other or others, of "the children or child of my said daughter *Mary Crook*" as she should appoint, and in default "upon trust for the child, if only one, or all the children, if more than one, of my said daughter *Mary Crook*," who being a son should attain twenty-one, or being a daughter should attain that age or marry. But if there should not be any child of his said daughter *Mary Crook* who being a son should attain twenty-one, or being a daughter attain that age or marry, the testator declared

(1) Law Rep. 6 Ch. 311; Ibid. 6 H. L. 265.

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that, subject to any appointment made in exercise of the power aforesaid, the said hereditaments should be held upon similar trusts in favour of his daughter *Emma Hill* and her child or children.

Statement.

The testator died on the 22nd of March, 1859. His daughter *Mary*, referred to by the testator in his will as "my daughter *Mary*, the wife of the said *John Crook*," had in the year 1851, with the full knowledge of the testator, gone through the ceremony of marriage with *John Crook*, who had been the husband of her deceased sister *Sarah Ann*. *Sarah Ann Crook* died in 1851, and the union of *John Crook* and *Mary Crook* was always looked upon by the testator as an existing marriage. Two children of *Mary Crook* were born after this marriage, and during the lifetime of the testator, viz., *Sarah Alice*, who was born in November, 1854, and *Ernest William*, who was born in July, 1858. At the date of the testator's will *Mary Crook* was, and for about six months had been, with the knowledge of the testator, *enceinte* with another child, namely, *Robert Crook*, who was born about three months after the testator's death, on the 27th of June, 1859.

Mary Crook had another child, named *Edward Crook*, who was born after the testator's death on the 11th of June, 1860; she never had any other issue, and lived with her husband *John Crook* until her death. She made a will in exercise of her power, in which she described herself as "*Mary Crook*, wife of *John Crook*," and thereby appointed the property subject to the power upon trust for her "four children, *Sarah Alice, Ernest William, Robert*, and *Edward*," or such of them as should attain twenty-one or marry, in equal shares.

The bill in this suit was filed by *Ernest William* and *Sarah Alice Crook*, the two children born in the testator's lifetime, against the trustees of his will and the infant *Robert Crook*, for a declaration that the Plaintiffs, and, if the Court shall be of such opinion, the Defendant *Robert Crook*, were intended by the testator's will to take as children of the testator's daughter *Mary Crook*.

Argument.

Dickinson, Q.C., and *F. H. Colt*, for the Plaintiff:—

There is no question that the illegitimate child begotten and born after the testator's death cannot take, and we submit to the Court the question whether the child *en ventre sa mère* can.

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Hinde Palmer, Q.C., and *Thurstan Holland*, for the two children *Robert* and *Edward Crook*:—

As to *Edward*, the child born a year after the testator's death, it may be difficult to contend upon the authorities that he can take under this will, though the observations of Lord *Eldon* in *Gordon* v. *Gordon* (1) and of Lord Justice *James* in *Occleston* v. *Fullalove* (2) shew that the supposed rule that unborn illegitimate children cannot by any possibility be provided for is inadmissible. But we contend that *Robert*, at any rate, the child *en ventre sa mère* at the date of the will and the death, is clearly entitled. Had he been actually born before the death, there would have been no doubt, and being *en ventre sa mère* he was to all intents and purposes an existing child within the principles laid down in *Occleston* v. *Fullalove* and *Hill* v. *Crook* (3). The rule excluding illegitimate children from taking under a gift to children is founded upon two considerations, first, the uncertainty as to the object of the gift; secondly, public policy and the supposed discouragement of immorality. Now, the uncertainty in such cases is only the uncertainty of paternity; and where, as here, the child to take is the child of a designated woman and not the child of a designated man (which distinguishes the case from *Pratt* v. *Mathew* (4)), no element of uncertainty can exist even as to her future children: *Gordon* v. *Gordon*; *Jarman* on Wills (5); unless the child was to be hers by some particular man, which is not the present case.

Neither is this child *Robert* precluded from taking on the ground of public policy. The doctrine of public policy as applied to provisions for illegitimate children arose from the desire to discourage concubinage; but here this child was procreated, and was in the eye of the law actually in being at the date of the will and of the testator's death. The testator knew when he made his will that his daughter was then *enceinte;* the analogy is not to a gift in consideration of future cohabitation, but to a bond in consideration of past cohabitation, which is good; and thus the case comes exactly within the principles enunciated by Lord *Eldon* in *Gordon* v. *Gordon*, by Lord Justice *James* in *Occleston* v. *Fullalove* and

(1) 1 Mer. 141, 152.
(2) Law Rep. 9 Ch. 147, 160.
(3) Law Rep. 6 H. L. 265, 278.
(4) 22 Beav. 328, 339.
(5) Vol. ii. p. 228.

Crook v. *Hill* (1), by Vice-Chancellor *Stuart* in *Holt* v. *Sindrey* (2), and by the House of Lords in *Hill* v. *Crook* (3) and *Dorin* v. *Dorin* (4). These cases all shew that there is nothing contrary to public policy in making provision for illegitimate children, at all events when actually begotten; and in *Occleston* v. *Fullalove* (5) Lord Justice *James* stigmatises the neglect of a father to do so as a "great crime."

Moreover, when a question of morality and public policy is involved, the Court cannot shut its eyes to the fact that amongst our fellow subjects in the colonies laws have been passed which legalize marriage with a deceased wife's sister, which laws have, in due course, been sanctioned by the Crown.

The whole question, then, comes to this: is there in the will a sufficient designation of this illegitimate child? For it is clear from the authorities that an illegitimate child *en ventre sa mère* may take by particular description before its birth: *Dawson* v. *Dawson* (6); *Blason* v. *Blason* (7); *Earle* v. *Wilson* (8); *Medworth* v. *Pope* (9); and here we contend that, looking at the fact that the testator considered the marriage as a valid marriage, *John Crook* as his son-in-law, his daughter *Mary* as *John Crook's* wife, and her children as her legitimate children and his own grandchildren, there is upon the face of the will sufficient designation to entitle this child to the benefit of the provisions contained in it.

Ince, Q.C., and *Whitaker*, for the surviving trustee of the testator's will.

Begg, for the representatives of a deceased trustee.

HALL, V.C.:—

It appears to me that the child of which this lady was *enceinte* at the date of the testator's will comes within the class of "children" described as "the children of my daughter *Mary Crook*," and is capable of taking under the power of appointment exercised by

(1) Law Rep. 6 Ch. 311.
(2) Ibid. 7 Eq. 170, 176.
(3) Ibid. 6 H. L. 265, 278.
(4) Ibid. 7 H. L. 568, 573.
(5) Law Rep. 9 Ch. 147, 160.
(6) 6 Madd. 292.
(7) 10 Jur. (N.S.) 1113.
(8) 17 Ves. 528.
(9) 27 Beav. 71.

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the daughter's will. It is the general rule that a child *en ventre sa mère* comes within the expression "child or children," and is included in a trust in favour of children whether described as children *in esse*, living at the death, begotten and to be begotten, begotten and born, or in any other similar way.

Is there, then, anything in this case, irrespective of the question of policy, which should give to the word "children" a different meaning? The case both before the Lords Justices and before the House of Lords has proceeded on the view that the testator had thought proper to make a will based upon the assumption that the union of his daughter *Mary* with *John Crook* was a legal marriage, and all his dispositions for the objects to take under his will are framed upon this footing. It is clear, then, that, meaning, as he did, by the word "children" the issue of that union, he must be taken to have meant to include a child *en ventre sa mère*. The only question is, whether there is anything in public policy which prevents such a child taking. I think there is not, for the child having been already procreated, there can be no encouragement to immorality in providing for it. Therefore, whether the child is to be considered as claiming under the will of the testator, or under the appointment made under the power conferred by his will, the latter being, I consider, the true view, the child is entitled to take. He was an existing child at the date of the testator's will, and as much entitled as if the testator had actually described him as the child of which his daughter was then *enceinte*.

As regards the other child, who was both begotten and born after the testator's death, he cannot take; his taking being against the policy of the law.

Solicitors: *Turner & Son; Wilkins & Blyth.*

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[1873 J. 10.]

June 26, 27.

Vendor and Purchaser—Contract for Sale—Condition precluding Inquiry as to Title—Discovery aliunde—Common Mistake—Specific Performance.

The Defendant contracted to buy from the Plaintiff freeholds and leaseholds under the condition that he should assume that *E. M.*, who died in 1841, was seised in fee of the freeholds, and should not "require the production of or investigate or make any objection in respect of the prior title" thereto.

He accepted the title, and before completion contracted to sell the lands, with a farm of his own adjoining the freeholds, to a sub-purchaser, who discovered, from an inclosure award prior in date to 1841 (as to the effect of which both the Plaintiff and Defendant had been under a misapprehension), that the freeholds had never belonged to *E. M.*, but at the date of the contract belonged to the Defendant himself in fee, subject to a leasehold interest in the Plaintiff.

The Defendant then refused to complete, and the Plaintiff filed her bill for specific performance, stating that she too had discovered that part of the lands she had contracted to sell as leaseholds belonged to her in fee simple, and offering mutual waiver or compensation:—

Held, that the Defendant was not precluded by the condition or the acceptance of title from taking the objection, and that the Court could not decree specific performance; but that, although there was no fraud, yet, there being a common mistake, the Defendant was entitled to an inquiry as to the title to the freeholds at the date of the contract.

Observations upon the authorities as to conditions restricting investigation of title, and upon *Bingham* v. *Bingham* (1).

Semble, the Court will, even in the case of a completed contract, give relief against a common mistake without fraud.

Statement.

BY articles of agreement dated the 28th of September, 1871, and made between *Richard Jones* and his wife, the Plaintiff *Jane Jones*, therein called the vendors, of the one part, and the Defendant of the other part, the vendors agreed to sell and the Defendant to purchase for £2350, *inter alia*, "First, the pieces of land described in the first schedule hereto and the inheritance thereof in fee simple, free from incumbrances;" and secondly, certain hereditaments described in the second schedule thereto as leaseholds.

The agreement provided that the purchase should be completed on the 26th of December, 1871, and as to the title to the free-

(1) 1 Ves. Sen. 126.

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holds comprised in the first schedule, it provided in clause 4 as follows:—"The purchaser shall assume that *E. Mountford*, who died on the 22nd of April, 1841, died intestate, leaving the said *Jane Jones*" (*i.e.*, the Plaintiff), "his only child and heiress-at-law, him surviving; and that the said *E. Mountford* was at the time of his death seised in fee simple of the said premises, and shall not require the production of, or investigate or make any objection in respect of the prior title to the said lot, whether such prior title is or not referred to in any abstracted document. The vendors will, however, at their own expense, if required, furnish a statutory declaration by a competent person that the said *E. Mountford* was in possession or receipt of the rents of the said hereditaments and premises as the owner thereof at the time of his decease, and that the vendors have since received the rents of the said hereditaments." The agreement also provided that all requisitions in respect of the title should be delivered within a specified time, and all requisitions not sent within that time should be considered to be waived; and also that the premises were believed to be correctly described, but that if any error or misstatement should be found in the schedules the same should not annul the sale, but compensation should be made in respect thereof, the amount whereof should be ascertained by arbitration in the usual way.

The first schedule to this agreement comprised three pieces of land in the township of *Hopton Upcha*, in the county of *Montgomery*, containing together 2A. 1R. 32P., and numbered 94, 110, and 116 in the plan of the tithe commutation apportionment for the township of *Hopton Upcha;* and the second schedule comprised about 100 acres of arable and pasture lands and about 120 acres of sheep walks.

In pursuance of the agreement, the vendors duly delivered their abstract of title, and no objection to the title was taken within the time limited in that behalf, the purchaser then believing, as he alleged in his original answer, that the Plaintiff had an absolute power of appointment over the hereditaments comprised in the schedules, and that she and her husband were able to make a good title to the freehold hereditaments comprised in the first schedule for an estate in fee simple, and were absolutely entitled to the leasehold interest in the rest.

The Defendant, who, as he alleged, had entered into the contract with the view of re-selling the property together with an estate of his own called the *Lower House Farm*, to the dwelling-house on which the fields Nos. 110 and 116 were contiguous, did not succeed at first in finding a sub-purchaser, and could not complete the purchase within the time named in the agreement. The vendors, however, at his request, and as a matter of indulgence, gave him further time to enable him to carry out the contract. But after waiting some time they found that no steps were being taken towards completion, and a correspondence then ensued between the solicitors of the parties, in which the vendors pressed for completion, and the purchaser desired further time, offering to pay interest on the purchase-money.

Richard Jones, the Plaintiff's husband, died on the 12th of July, 1872, and the Defendant still failing to complete, after a further correspondence, in which legal proceedings were threatened, the Plaintiff, on the 5th of February, 1873, filed her original bill in this suit, alleging that she was seised in fee simple of the freehold hereditaments comprised in the first schedule, and absolutely entitled to the leasehold hereditaments for the residue of the terms of years therein, and praying for specific performance of the agreement. On the 12th of August, 1873, the Defendant filed his answer to the original bill, and thereby he admitted that the Plaintiff's solicitors had, on the 14th of November, 1871, delivered "a perfect abstract of title as limited by the articles of the agreement," that no objection had been taken to the title, and that his solicitors had ever since retained the abstract, and he stated that he had always been and still was desirous to complete the contract.

However, on the 5th of March, 1876, the Defendant filed a supplemental answer, in which he insisted that he was not bound to complete the purchase, and raised a defence which was shortly as follows:—At the date of his answer the abstract had been perused by his solicitor, but had not been verified; after the answer the solicitor proceeded with the investigation of the title, and the abstract was verified by the Plaintiff's solicitor subject to the fourth condition, which precluded the purchaser from investigating the title to the hereditaments comprised in the first

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schedule prior to the death of *Edward Mountford*, whose seisin in fee thereof the purchaser was bound to assume; and prior to the comparison of the abstract with the deeds the Defendant's solicitor had made several unsuccessful attempts to obtain inspection of the *Hopton* inclosure award for the purpose of the title to the *Lower House Farm*. In September, 1873, the Defendant contracted with one *Henry Keate* for the sale to him of the *Lower House Farm*, and also of the property which the Defendant had contracted to purchase from the Plaintiff, and *Keate's* solicitor, in investigating the Defendant's title, succeeded in obtaining an inspection of the *Hopton* inclosure award, and then, on the 22nd of December, 1873, discovered that the freehold pieces of land comprised in the first schedule to the agreement of the 28th of September, 1871, and numbered 94, 110, and 116, had never belonged to *Edward Mountford*, the Plaintiff's father, and not only did not at the date of the contract belong to the Plaintiff, but, subject to a term (a few years only of which remained unexpired) which had been created in 1781 and was now vested in the Plaintiff, belonged absolutely to the Defendant himself; the property in question having been by this award allotted to one *Thomas Morgan*, through whom the Defendant derived his title. The solicitor of the Defendant then, on the 23rd of December, 1873, wrote to the Plaintiff's solicitor stating this discovery, and submitting that the fact of the Plaintiff not having the title claimed by her to the most important part of the subject of the contract vitiated the entire contract.

This letter was answered by the Plaintiff's solicitor on the 24th of December, 1873, as follows:—

"Dear Sir,

"*Lower House.*

"I had an appointment with Mrs. *Jones* to-day, and laid before her yours of yesterday, as to the freehold property contracted to be sold to Col. *Clifford*. Her surprise was no less than your own seems to have been. Without prejudice to the contract and her right under the same as against Col. *Clifford*, there seems to be no difficulty in the matter. As you seem to have seen the award, which I could never get at, nor could my client, you must also have seen that the parcels on plan 94, 110, and 116, were allotted

to *Thomas Morgan* in exchange for an allotment to *Joseph Davies* and *John Francis* containing 2A. 3R. 16P., part of a field called *The Four Acres*, numbered 14 on the sale plan, and there called *Lower Llanahereod Meadow*. This allotment of 2A. 3R. 16P. was clearly the land of which Mr. *Mountford* was seised in fee, for the conveyances of which to him Mr. *Broughall* saw when at my office examining the deeds. *Francis'* moiety was purchased by Mr. *Mountford* in 1825, and was conveyed by deed of feoffment, and Miss *Dorothy Davies*, one of the witnesses to livery, is still living, and can speak positively to the fact as indorsed on the deed. The other moiety (*Davies'*) was purchased in 1840. Mr. *Mountford* was at this time between eighty and ninety years of age, and the conveyance was prepared by a Mr. *Farmer*, of *Montgomery*, of a moiety of parcels 94, 110, and 116, instead of the allotment to *Francis* and *Davies*. In the first moiety the consideration was £19, and for the second £55. The tithe commutation was made after Mr. *Mountford's* death, and it seems to have set us all wrong, and I suggest the better plan will be simply to substitute in the conveyance from Mrs. *Jones* the 2A. 3R. 16P. instead of the three smaller pieces allotted to Col. *Clifford*. As to these, Mrs. *Jones* will, if required, give absolute covenants for title.

"Yours truly,

"*E. Maurice Jones.*

"Messrs. *Winnett & Son.*"

To this letter the Defendant's solicitor replied, on the 29th of December, 1873, that his client would not have entered into the contract at all had he known that the freehold land to which the Plaintiff was entitled was the 2A. 3R. 16P., and not Nos. 94, 110, and 116; and he maintained that the Defendant, having contracted to purchase lands in a situation of great importance to him, could not be asked to take lands in another situation, and was entitled to retire altogether from the contract; he offered, however, to buy the Plaintiff's leasehold interest at a ten years' purchase, and to give a fair price for the 2A. 3R. 16P. if *Keate* would accept the Plaintiff's title. The Defendant in his supplemental answer then set out further correspondence in which this offer was declined, and pleaded that until the discovery he was entirely ignorant of his title to Nos. 94, 110, and 116, that his chief inducement to enter

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into the contract with the Plaintiff was that he might thereby acquire Nos. 110 and 116, which lay close to the dwelling-house upon the *Lower House Farm* and materially enhanced its value, and he insisted that as the contract had been entered into under mutual mistake and misapprehension, it was not binding upon him, and that the Plaintiff's bill should be dismissed with costs.

The Plaintiff then amended her bill, pleaded that the Defendant had in fact accepted her title, denied the truth of the alleged discovery, insisted that her title to the hereditaments was a good one, and charged that the Defendant was by the conditions of his agreement, and by his laches, precluded from taking the objection. She also stated that since the agreement she had discovered that three acres of the hereditaments comprised in the second schedule belonged to her in fee simple, and not merely for a leasehold interest, and that the Defendant at the date of the agreement was not (as claimed by him) entitled to the fee simple therein, subject to her leasehold interest; she submitted, however, to waive all claim to compensation on this score, and to recognise the freehold interest as being vested in the Defendant if he would perform the agreement in its integrity, and abandon his claim to the fee simple of Nos. 94, 110, and 116. Moreover, if the Court should be of opinion that the Defendant was not precluded from taking his objection, and it should be sustained on investigation of the title, the Plaintiff offered to allow him reasonable compensation under the agreement in respect of the 2A. 1R. 32P., Nos. 94, 110, and 116, upon his allowing her similar compensation in respect of the three acres, charging that in this case there ought to be a decree for specific performance with such compensation.

The amended bill then prayed that, regard being had and subject to the charges made by and submissions contained in it, the Defendant might be ordered specifically to perform the agreement, the Plaintiff making the usual offer on her part. It appeared that the only requisition which the Defendant had made was for a statutory declaration not in the terms of condition 4 that *E. Mountford* was in possession of the rents as owner, but only as to the heirship of the Plaintiff to him, which was duly furnished.

The action now came on for hearing, and was argued upon the facts as stated above.

Morgan, Q.C., and *Romer*, for the Plaintiff:—

It is clear from the Defendant's own answer that he accepted the title of the Plaintiff; and an acceptance of title, unless induced by fraud, cannot be withdrawn; there was, moreover, acceptance by conduct, for the Defendant took steps to sub-sell the property which were inconsistent with an intention to dispute the title, and were evidence of waiver: *Dart's* Vendors and Purchasers (1); *Simpson* v. *Sadd* (2). At all events, the objection of the Defendant is covered by condition 4, which binds him to assume the seisin of *E. Mountford*, and precludes him from requiring the production of, or investigating or making any objection in respect of the prior title. This is a stipulation that the Defendant must accept that title without objection or inquiry, which, in the absence of fraud, binds him, and is perfectly lawful: *Spratt* v. *Jeffery* (3). A similar question arose in *Hume* v. *Bentley* (4), where, upon a sale by auction of leasehold property, one of the conditions was that the lessor's title should not be shewn, and should not be inquired into; and although it appeared on certain Acts of Parliament produced by the purchaser, that the lessor had no power to lease the premises, it was held that the condition precluded the purchaser from inquiring into the lessor's title for every purpose, and specific performance was decreed. So here the Defendant is not at liberty to shew *aliunde* that *Mountford* had no title: *Hume* v. *Pocock* (5).

In the case of *Harnett* v. *Baker* (6) the condition was founded upon a statement of facts which the vendor was bound to know was erroneous. Here the purchaser had the same means of discovery and knowledge as the vendor.

A vendor need not direct a purchaser's notice to any matter of which the purchaser has actual or implied notice: *Dart's* Vendors and Purchasers (7); and surely a purchaser must have implied, even if not actual, notice of the state of his own title.

If a vendor, in the *bonâ fide* belief that he has a good title, enters into a contract containing a condition precluding the purchaser

(1) 4th Ed. p. 398.
(2) 3 Eq. Rep. 263; 4 D. M. & G. 665; 2 Sm. & Giff. 469.
(3) 10 B. & C. 249.
(4) 5 De G. & Sm. 520, 525.
(5) Law Rep. 1 Eq. 423; Ibid. 1 Ch. 379.
(6) Law Rep. 20 Eq. 50.
(7) 4th Ed. p. 85.

(2) 8 C 16 Jur 935; 1 Jur N.S. 457.

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from investigating any particular part of it, the purchaser cannot, in the absence of fraud, impeach the contract on the ground of a defect in that part of the title which he is restrained from investigating.

Therefore, even if it should turn out that part of the property which the purchaser has bought is his own, by the terms of the contract he cannot take the objection. The award to *Mountford* was, however, made in 1841, and since that time we have been in receipt of the rents and profits of this property without any acknowledgment of the Defendant's right, so that we have a good title by adverse possession, which gives us the right to specific performance.

Again, had it not been for the year and a half time which the Plaintiff accorded to the Defendant as a pure matter of indulgence, this question would never have arisen, for the purchase would have been completed without this objection having been taken; the only requisition made by the Defendant having been that for a statutory declaration of the heirship of the Plaintiff to Mr. *Mountford*, which was supplied. So that, if specific performance is not decreed, the Defendant will have taken advantage of this delay to obtain in this manner particulars of title wherewith to oust the vendor. On the whole, the Plaintiff is entitled to a decree, with a declaration that the title has been accepted, or if a reference is directed, with a reference subject to the conditions of sale.

Argument.

Dickinson, Q.C., and *Rodwell*, for the Defendant:—

No objection was made to the Plaintiff's title in the first instance, for the Defendant was not aware of any until December, 1873, but if the abstract furnished had been complete, and had contained abstracts of the conveyances to *Mountford*, the defect in the Plaintiff's title would have been discovered.

The title was only accepted in the belief that *Mountford* died seised in fee of the lands in the first schedule, and that a statutory declaration could be furnished that he was at his death in possession of the rents and profits as owner thereof. This was not the case, though the correspondence shews that the vendor's solicitor was able to give full information as to the award.

There was, in fact, a common mistake, and the vendor is not

entitled to rely upon condition 4. Restrictive conditions have always been strictly construed. The case of *Spratt* v. *Jeffery* (1), cited by the other side, was disapproved of in *Shepherd* v. *Keatley* (2), and in *Darlington* v. *Hamilton* (3), a suit for specific performance of a contract for the sale of leaseholds where there was a condition that the purchaser should not require proof or production of the lessor's title, Vice-Chancellor *Wood* said: "It is quite clear, according to the doctrine referred to and confirmed in *Warren* v. *Richardson* (4) and *Shepherd* v. *Keatley*, that whatever may be the terms of the condition of sale, if the purchaser obtain information *aliunde* that the title of the vendor is not clear and distinct, he has a right to insist upon the objection." Again, in *Harnett* v. *Baker* (5), Vice-Chancellor *Malins* says, in commenting on the cases, "In the case of *Spratt* v. *Jeffery* it was held that a stipulation precluding the purchaser from inquiring into the lessor's title was valid. That was afterwards thought to be unreasonable, and therefore, in the cases of *Shepherd* v. *Keatley* and *Warren* v. *Richardson* it was decided, and it is now finally settled as a rule of law, that although there be a stipulation that the title of the lessor is not to be shewn, although there may be any stipulation that a certain fact is not to be required to be shewn, if it turns out in the first case that the lessor's title is bad, and, in the second case, that the statement of the fact is erroneous, the purchaser may take advantage of the error, and although he is *primâ facie* bound by the conditions, in the result he is not bound at all."

The same principles governed the judgment of the Court of Queen's Bench in *Waddell* v. *Wolfe* (6).

But the condition in this case is not in its terms wide enough for the Plaintiff's contention; it is not a condition which binds him to accept such title as the vendor has, though that is the extent to which the Plaintiff desires to go.

The argument that a man must know his own title, and in the absence of fraud may be compelled to buy his own property and estopped from saying it is his, is untenable on principle; and

(1) 10 B. & C. 249.
(2) 1 C. M. & R. 117.
(3) Kay, 550, 558.
(4) You. 1.
(5) Law Rep. 20 Eq. 50, 55.
(6) Ibid. 9 Q. B. 515.

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there is, moreover, direct authority against it. In *Bingham* v. *Bingham* (1), where the sale of an estate by the Defendant to the Plaintiff was completed and the purchase-money paid, the bill was to have the money refunded, as it appeared to have been the Plaintiff's estate; and although it was insisted that it was the Plaintiff's own fault, as the title had been produced, and he had had time to consider it, yet it was decreed for the Plaintiff with costs and interest; "for though no fraud appeared, and the Defendant apprehended he had a right, yet there was a plain mistake, such as the Court was warranted to relieve against, and not to suffer the Defendant to run away with the money in consideration of the sale of an estate to which he had no right."

Then, as to compensation, the Plaintiff offers to substitute a small piece of land which we do not want for that which was our inducement for entering into the contract.

The bill ought either to be dismissed or an inquiry directed whether *Mountford* was in fact seised in fee of the lands in question.

Morgan, in reply:—

The authorities upon conditions restrictive of a purchaser's right to investigate a vendor's title are divisible into two classes, first, cases in which the conditions of sale preclude the purchaser from making requisitions upon the vendor as to his title, such as *Shepherd* v. *Keatley* (2); and secondly, cases in which they go further, and preclude him even from making investigation *aliunde* as to the vendor's title—such as *Spratt* v. *Jeffery* (3) and *Hume* v. *Bentley* (4). Here the condition is that the purchaser "shall not investigate or make any objection in respect of" the title; and it falls within the latter class of authorities.

Judgment.

HALL, V.C.:—

This is a case of a different kind from those which have been cited, and the conclusion at which I have arrived is that the Plaintiff is not, under all the circumstances, entitled to a declaration that she can make a title, but that she is entitled to have an

(1) 1 Ves. Sen. 126.
(2) 1 C. M. & R. 117.
(3) 10 B. & C. 249.
(4) 5 De G. & Sm. 520, 525.

inquiry as to title. The Plaintiff had entered into a contract containing the usual stipulations as to making objections within a specified time, and it was clear that there was, or must be taken to have been, an acceptance of the title. As regards the not furnishing a statutory declaration of the ownership of Mr. *Mountford*, it appears to me that the Plaintiff is right, because the declaration was only to be given if required, and in point of fact no requisition was ever made for such declaration, the only declaration required having been that as to the heirship of the vendor to Mr. *Mountford*, which was furnished, and nothing more remained to be done. The Defendant, it is to be observed, had purchased the property in question in order to sell it again as part of a larger estate; and there was great delay on his part in the completion of the purchase. The Plaintiff was meanwhile extremely indulgent in allowing the matter to stand over; and it was only by accident that, more than two years after the date of the contract, the defect in the title came out. It was, moreover, through the indulgence of the Plaintiff that the discovery was made, for she, though not bound so to do, yet, apprehending no difficulty, produced to the sub-purchaser's solicitor documents in the possession of her solicitor, which gave rise to the objection; for in fact it was the sub-purchaser and not the purchaser who first raised the point. Then this difficulty having arisen, and the purchase being not yet completed, the purchaser's solicitor said, "We have been proceeding under a mistake; you have not got the property you profess to sell. You have sold as freehold what really is leasehold, and as your own what really is mine, subject perhaps to a lease to which you are entitled." Under the circumstances it appears to me that, quite irrespective of the letter of the 24th of December, 1873, written by the Defendant's solicitor, the Court is not justified in ordering specific performance of this contract, but that there is quite enough to justify it in directing a further investigation as to the title to the property comprised in it. The Plaintiff clearly admits an error with regard to part of the property which she sold as leasehold and which turns out to be freehold, and this can only be accounted for by supposing (and there is enough, I think, to shew it was so) that the two properties were included in one title, and that the two abstracted leases were

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probably derived under the same title. I cannot, in this state of the evidence, refuse the purchaser some inquiry, representing, as he does, that part of the property which he purchased was really his own. On each side, therefore, there seems to be a case for inquiry, unless by the terms of the contract itself, and according to the law on the subject, inquiry is shut out both for vendor and purchaser.

It has been said that even if it is made out that the purchaser has bought his own property, yet that, having regard to the terms of the contract and the law, he ought to be compelled to complete his purchase and pay for that which is his own. The cases are divisible into two classes: first, cases in which the terms of the contract preclude the purchaser from making requisitions upon the vendor as to his title; and, secondly, cases in which they preclude him not only from making inquiries from the vendor as to his title, but from making any investigation anywhere about the title. A condition of the latter class is no doubt valid, but the Court has never yet gone so far as to hold that such a condition precludes a purchaser from saying to the vendor, at any rate before the completion of the contract, "We have both been proceeding under a common mistake. You said the property was yours, but I now find by some document which I have seen that it is mine, and the contract which you are asking me to complete is one without consideration, for I shall be paying the purchase-money and getting nothing for it." The condition has never been construed to include such a case as that. And where there has been such a common mistake, and there is no fraud, the Court will not, in a suit for specific performance, compel the purchaser to complete such a contract.

The case of *Bingham* v. *Bingham* (1), which was referred to on behalf of the Defendant, carries the matter further, unless the decision there depended upon fraud, as to which I shall say more. That case is an authority to the effect that, under circumstances like the present, even if the contract had been completed and the purchase-money paid, the purchaser might come to the Court, and saying, "I have paid for what was my own," compel the vendor to refund the money. That case is good law and has not been ques-

(1) 1 Ves. Sen. 126.

tioned, and I may refer to the observations upon it which have been made in several editions of *Sugden's* Vendors and Purchasers. In the tenth edition the case will be found referred to with a long statement taken from the Registrar's book, and it would seem that the case had not been considered as one of fraud. There was, it is true, misrepresentation on the part of the Defendant as to the state of the title, to the effect that a will devising the estate to the Plaintiff was invalid, the Defendant insisting that the testator had no power to make such devise, but that if he had, the Plaintiff should have been better advised before he parted with his money. But there was no fraud, and nothing beyond this misstatement of the legal effect of an instrument. The case is referred to as an authority for the general proposition contended for by the Defendant, and though in some editions Lord *St. Leonards* has thrown out doubts whether it would apply in the absence of the element of fraud, in the last edition he definitely stated the case as an authority for the proposition under circumstances in which "no fraud appeared" (1); and the case has been recognised as an authority applicable to cases where there has been no fraud. In *Saunders* v. *Lord Annesley* (2), referred to by Lord *St. Leonards* on the same page, Lord *Redesdale* expressed a doubt whether equity would interfere in a similar case in the absence of fraud. He says: "In a case of fraud it certainly might; in a case of mere ignorance, although I incline to think it might, yet after looking a little into the subject, I find great difficulty in holding that a Court of Equity could interfere." But more recently, in *Cochrane* v. *Willis* (3), the Master of the Rolls in the Court below, and Lord Justice *Turner* in the Court of Appeal (4), treated *Bingham* v. *Bingham* (5) as an authority in a case of mistake as distinguished from one of fraud. *Bingham* v. *Bingham* was decided by *Fortescue*, M.R., sitting for Lord *Hardwicke*. I may also refer upon this point to what was said by two learned Judges, Lords *Cranworth* and *Westbury*, in *Cooper* v. *Phibbs* (6). Lord *Cranworth* says (7): "The consequence was, that the present Appellant, when,

(1) Sug. V. & P. 14th Ed. p. 245.
(2) 2 Sch. & Lef. 101.
(3) 34 Beav. 368; Law Rep. 1 Ch. 58.
(4) Law Rep. 1 Ch. 64.
(5) 1 Ves. Sen. 126.
(6) Law Rep. 2 H. L. 149.
(7) Law Rep. 2 H. L. 164.

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after the death of his uncle, he entered into the agreement to take a lease of this property, entered into an agreement to take a lease of what was, in truth, his own property; for, in truth, this fishery was bound by the covenant, and belonged to him, just as much as did the lands of *Ballysadare;* therefore, he says, I entered into the agreement under a common mistake, and I am entitled to be relieved from the consequence of it. In support of that proposition he relied upon a case which was decided in the time of Lord *Hardwicke,* not by Lord *Hardwicke* himself, but by the then Master of the Rolls, *Bingham* v. *Bingham* (1), where that relief was expressly administered. I believe that the doctrine there acted upon was perfectly correct doctrine, but even if it had not been, that will not at all shew that this Appellant is not entitled to this relief, because in this case the Appellant was led into the mistake by the misinformation given to him by his uncle, who is now represented by the Respondents."

Nothing can be clearer than this, that Lord *Cranworth* recognised the principle that the Court would, even in the case of a completed contract, give relief against a common mistake in the same way as it would against fraud. And Lord *Westbury* says (2): "It is said, '*Ignorantia juris haud excusat,* but in that maxim the word '*jus*' is used in the sense of denoting general law, the ordinary law of the country. But when the word '*jus*' is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake. Now, that was the case with these parties—the Respondents believed themselves to be entitled to the property, the Petitioner believed that he was a stranger to it, the mistake is discovered, and the agreement cannot stand."

It appears to me that the principle is thus rightly laid down by Lord *Westbury,* and that it applies to the case of an existing contract in a case where the Court is asked to make a decree for specific performance. I am, therefore, of opinion that in this case

(1) 1 Ves. Sen. 127. (2) Law Rep. 2 H. L. 170.

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an inquiry must be directed whether the hereditaments comprised in the first schedule of the contract for the purchase did or did not at the date of the contract, and do or do not belong absolutely to the Defendant, subject only to a term granted by a lease dated in the year 1781, a few years only of which remain unexpired. The affirmative of that it will be for the Defendant to make out. If he fails to do so there will be a decree for specific performance of the contract with all the consequences, and the Defendant will have to pay all the costs of the suit. Supposing, on the other hand, it should be ascertained that a title cannot be made, the case will come on again for further consideration, when the costs will remain to be disposed of. If both parties desire it, I will state how I think the case will then be dealt with.

Dickinson, Q.C., and *Morgan*, Q.C., having consented,

HIS LORDSHIP said: In case the Defendant should make out the affirmative, I think the case will not be one for specific performance with compensation, I shall then only dismiss the bill, and dismiss it without costs.

Solicitors for Plaintiff: *G. Cart*, agent for *E. M. Jones, Welchpool; Fortune*, agent for *Winnett & Son.*

LITTON *v.* LITTON.

V.-C. H.
1876
July 27.

[1876 L. 74.]

Practice—Rules of Court, 1875, *Orders* XXIV., *r.* 1; XXXVI., *r.* 4; XL., *r.* 11—"*Relief*"—*Rules of Court, June*, 1876, *Order* XXXVI., *r.* 4*a*.

A Defendant delivered a statement of defence which, if uncontradicted, was a good defence to the Plaintiff's claim; and the Plaintiff did not reply or obtain further time within the three weeks limited by Order XXIV., rule 1.

The Defendant then, before the expiration of the six weeks within which a Plaintiff must, under Order XXXVI., rule 4, give notice of trial, moved under Order XL., rule 11, that the action might be dismissed with costs, on

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the ground that, by not replying, the Plaintiff had admitted the defence within that rule:—

Held, that a Defendant seeking to dismiss an action under such circumstances was not a "party applying for relief" within the meaning of the rule.

Statement.

THE Plaintiff in this action had delivered a statement of claim and the Defendant had delivered a statement of defence which, if uncontradicted, constituted a good defence to the claim.

The Plaintiff had allowed the three weeks limited by Order XXIV., rule 1, to elapse without delivering his reply or obtaining an extension of time.

A motion was now made on behalf of the Defendant before the expiration of the six weeks within which the Plaintiff must, under Order XXXVI., rule 4a, of the Rules of Court, June 1876, give notice of trial, that the action might be dismissed with costs, on the ground that, by not replying, the Plaintiff had admitted the defence, so as to entitle the Defendant to an order under Order XL., rule 11.

Whitehead, in support of the motion.

Key, for the Plaintiff, *contrà*.

Judgment.

HALL, V.C.:—

Order XL., rule 11, does not apply to a case like this; for a Defendant seeking to dismiss an action in this manner is not a "party applying for relief" within the meaning of that rule. It is not at all a case of "relief." The Defendant's proper course, if the Plaintiff does not within the six weeks give notice of trial, is himself to give the notice; or under the new rule 4a of Order XXXVI., he may move to dismiss for want of prosecution. The motion is misconceived, and must be dismissed with costs.

Solicitors: *Bowker, Peake, & Bird; Girdlestone.*

In re FAWCUS. *Ex parte* BUCK.

C. J. B.
1876
June 19.

Reputed Ownership—Order and Disposition—Factor—Lien—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 15.

S., who had for many years traded as a timber merchant in his own name, entered into an agreement with *F. & Co.*, who were also timber merchants, to carry on his business thenceforth as their agent at a remuneration by way of a share of profits. The business was thenceforth carried on under this agreement, but in the name of *S.* as before. *S.* dealt with the timber in his possession as if he were the absolute owner of it (except as between himself and *F. & Co.*), and there was nothing done to inform the outside world of the change which had taken place. In the course of the business *F. & Co.* drew bills on *S.*, which he accepted in his own name to be protected by *F. & Co.* Both *F. & Co.* and afterwards *S.* filed liquidation petitions.

Before *S.'s* liquidation, *F. & Co.'s* trustee demanded the timber in his hands, which was refused :—

Held, that to the extent of the current bills *S.'s* estate had a lien on the timber.

Semble, the reputed ownership clause applies to goods in the hands of a factor, unless the relation of principal and factor is notorious.

Statement.

THIS was an appeal from a decision of the Judge of the *Sunderland* County Court.

For some years prior to 1870 *James Stephenson* carried on business as a timber merchant at *Sunderland*, on premises belonging to the River *Wear* Commissioners, under the firm of *James Stephenson & Co.* In 1870 he entered into an agreement with Messrs. *T. P. Fawcus & R. Lucas*, who were timber merchants at *West Hartlepool*, to carry on his business thenceforth for them, and as their agent. The business was thenceforth carried on by him under that arrangement, but under the old firm of *James Stephenson & Co.*, until January, 1874, when *T. P. Fawcus & Lucas* dissolved partnership, and *T. P. Fawcus* entered into partnership with *Robert Craggs*, and they thenceforth carried on the business of timber merchants at *West Hartlepool* under the firm of *Fawcus, Craggs, & Co.* On the 5th of January, 1874, an agreement was entered into between them and *Stephenson*, similar in its terms to the agreement between him and *Fawcus & Lucas*, and in substitution for that agreement.

The agreement of the 5th of January, 1874, contained a recital

C. J. B. 1876 *In re* FAWCUS. *Ex parte* BUCK. Statement.

that *T. P. Fawcus & Craggs* were carrying on business as timber merchants at *Sunderland* under the firm of *James Stephenson & Co.*, which business, under the same firm, had been carried on formerly by *Stephenson*, and lately by *Fawcus & Lucas*, and that *Fawcus & Craggs* had agreed to retain and employ *Stephenson* as manager of the business upon the terms and conditions thereinafter expressed. The agreement contained the following stipulations (*inter alia*) :—

1. That *Fawcus & Craggs* should, until the determination of the agreement as thereinafter provided, retain and employ *Stephenson* as their agent, but in the name of the firm of *James Stephenson & Co.*, to manage the business so carried on as aforesaid, and that *Stephenson* should, during such time as aforesaid, serve *Fawcus & Craggs* as such manager according to the terms and conditions therein expressed.

2. That *Fawcus & Craggs* might at any time at will remove from the premises at *Sunderland* any goods for the time being remaining unsold which they might have entrusted to *Stephenson* for sale or otherwise authorized him to sell.

3. That until the determination of the agreement *Stephenson* should not engage or enter into any trade or business on his own account, but should diligently employ himself as such agent in the conduct and management of such business as *Fawcus & Craggs* should entrust to him; that he should not, until the determination of the agreement, buy any timber as such agent, except of the firm of *Fawcus, Craggs, & Co.*, or with the express sanction in each case of *Fawcus & Craggs*.

4. That until the determination of the agreement *Stephenson* should not accept any bill of exchange or make or sign any promissory note on account of or in relation to the said business except at the request of *Fawcus & Craggs*.

5. That *Stephenson* should on request accept the drafts of *Fawcus & Craggs* for the value of any stock belonging to them for the time being remaining in the premises at *Sunderland*, *Fawcus & Craggs* jointly and severally undertaking to protect any such acceptances at maturity.

6. That *Stephenson* should keep all proper books of account of all goods entrusted to him for sale, and of all sales effected by him

as such agent, and from time to time hand over to *Fawcus & Craggs* all bills of exchange and promissory notes, and all cash and cheques that might be received by him in the course of business immediately after the same should be received, or at such stated periods as *Fawcus & Craggs* might from time to time determine.

Clause 9 provided that *Stephenson* should be remunerated for his services as agent by a share of the profits of the business, varying with the amount of the profits.

Clause 10 provided that, in the event of there being a loss, *Stephenson* should pay a third part of it.

Clause 12 provided that the agreement might be determined at any time by six months' notice on either side, and that, upon the expiration of the notice, *Fawcus & Craggs* should transfer the business premises at *Sunderland*, or their interest therein, to *Stephenson*, and from the date of such transfer *Stephenson* was to be solely liable for all rent and other outgoings in respect of the premises, and all debts due to the firm in respect of the business were to be recovered by *Fawcus & Craggs* in the name of *Stephenson*, or in their own name, and they were to have the power of using his name as might be necessary for the purpose.

Clause 13 contained a declaration that no partnership was intended to be created between *Fawcus & Craggs* on the one hand, and *Stephenson* on the other hand, but that the whole of the business intended to be carried on under the agreement was to be the business of *Fawcus & Craggs*, and was to be carried on by *Stephenson* under and subject to their orders and directions.

From the time of the agreement of 1870 the business was carried on by *Stephenson* under his old firm of *James Stephenson & Co.*, just as before, no notice having been given to outside creditors of any change. Part of the business premises continued to be occupied by *Stephenson* in his own name, and the remainder of the premises was assigned by him to *Fawcus & Lucas*, and afterwards by them to *Fawcus & Craggs*.

In the course of the business large quantities of timber were forwarded by *Fawcus, Craggs, & Co.* to *Stephenson* for sale, and were stored partly on the premises occupied by him in his own name, and partly on the premises rented by *Fawcus & Craggs*, part being left floating in the dock, and entered in the books of

C. J. B. 1875 *In re* Fawcus. *Ex parte* Buck. Statement.

the Commissioners as belonging to *James Stephenson & Co.*, and all this timber *Stephenson*, under the firm of *James Stephenson & Co.*, dealt with as the absolute owner, accounting, however, to *Fawcus, Craggs, & Co.*, under the terms of the agreement. They drew bills on *James Stephenson & Co.*, which *Stephenson* accepted in the name of that firm, and these bills were discounted by *Fawcus, Craggs, & Co.* The amount of these drafts was always, in fact, less than the value of the timber held by *Stephenson* for sale under the agreement, but there was no other stipulation with regard to the bills than that which was contained in the agreement.

On the 31st of May, 1875, *Fawcus & Craggs* filed a liquidation petition, in which they described themselves as trading at *West Hartlepool* under the firm of *Fawcus, Craggs, & Co.*, and at *Sunderland* under the firm of *James Stephenson & Co.* On the 2nd of June *C. S. Lane* was appointed receiver under this petition, and on the 21st of June the creditors resolved upon a liquidation by arrangement, and appointed *Lane* trustee of the debtors' property. On the 1st of June *Lane* (before his actual formal appointment as receiver) went to *Sunderland*, and demanded of *Stephenson* possession of the timber which was in his possession as agent for *Fawcus, Craggs, & Co.* *Stephenson* refused to give up possession, on the ground that he claimed to be entitled to a lien on the timber to secure him against liability on his acceptances pursuant to his arrangements with *Fawcus, Craggs, & Co.* At this time there were current bills to the amount of £5832, which *Stephenson* had accepted for *Fawcus, Craggs, & Co.* Three of those bills had been drawn by them, and the remainder had been drawn by their direction by another firm of *Fawcus, Fawcus, & Co.* *Stephenson* also alleged that a sum of £1232 was due to him by *Fawcus, Craggs, & Co.*, in respect of his share of the profits of the business. Ultimately it was arranged that *Stephenson* should retain possession of the timber on behalf of *Lane* as receiver, but without prejudice to any right of lien to which he might be entitled.

After this *Stephenson* continued in possession of the timber, and dealt with it just as before, furnishing, however, an account to *Lane*. Soon afterwards *Stephenson* was served with a debtor's summons at the instance of the holders of one of his acceptances on behalf of *Fawcus, Craggs, & Co.*, and on the 22nd of June, 1875,

Statement.

he filed a liquidation petition, under which *Robert Buck* was appointed receiver, and he at once took possession of the timber then in the possession of *Stephenson*. On the 9th of July the creditors resolved on a liquidation by arrangement, and appointed *Buck* trustee. By arrangement between him and *Lane* the timber was sold, and the proceeds of sale, amounting to £8000, were paid into a bank in the joint names of *Buck* and *Lane*. On the 1st of March, 1876, *Buck* gave notice of an application to the County Court for an order declaring that the £8000 belonged to him as the trustee of *Stephenson*.

Henry Fawcus, one of the partners in the firm of *Fawcus, Fawcus, & Co.*, deposed that they agreed to draw the bills which they had drawn on *James Stephenson & Co.* upon the express understanding that the latter firm held timber to a greater value than the amount of the bills, which timber they could, in case of need, hypothecate to pay the bills.

This was denied by *Craggs*.

The Judge made an order declaring that the £8000 was the property of *Lane*, as trustee of *Fawcus & Craggs*.

Buck appealed. On the hearing of the appeal, some further affidavits, filed on behalf of *Lane*, were allowed to be read, with the view of shewing that it was notorious in the timber trade at *Sunderland* that the business of *James Stephenson & Co.* belonged in fact to *Fawcus, Craggs, & Co.*, and that it was carried on by *Stephenson* only as agent or factor for them.

Argument.

Roxburgh, Q.C., and *W. S. Owen*, for the Appellant:—

Stephenson was entitled to a factor's lien on the timber in his possession for the amount of his acceptances on behalf of *Fawcus & Craggs*: *In re Pavy's Patent Felted Fabric Company* (1). But, more than that, we contend that the timber which was in *Stephenson's* possession at the commencement of his liquidation passed to his trustee under the reputed ownership clause: *Bankruptcy Act*, 1869, sect. 15; *Ex parte Watkins* (2). The County Court Judge relied on *Ex parte Boden* (3) as an authority that the reputed ownership clause does not apply to goods of a principal in the

(1) 1 Ch. D. 631. (2) Law Rep. 8 Ch. 520, 528.
(3) 28 L. T. (N.S.) 174.

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possession of a factor. But in that case the evidence shewed that the bankrupt's dealing as a factor was notorious, whereas here it was kept secret. He always dealt with the timber as absolute owner.

De Gex, Q.C., and *T. Witt*, for the trustee of *Fawcus & Craggs* :—

This is simply the case of the same persons carrying on business in two places under distinct firms. They were drawing bills upon themselves, and no action could have been maintained on the bills. Any equity to have the timber specifically applied to meet the bills could be maintained only by the holders of the bills, and they have not asserted any such right. But even they could not support such a claim, because, according to the terms of the agreement, *Fawcus & Craggs* could remove the timber at any time. The agreement is altogether inconsistent with the existence of any lien : *Bock* v. *Gorissen* (1). *In re Pavy's Patent Felted Fabric Company* (2) was a different case. As to the doctrine of reputed ownership, it has long been settled that property of a principal in the hands of a factor is exempt from its operation. And it makes no difference whether the bankrupt's dealing as a factor is notorious or not : *Ex parte Moldaut* (3) ; *In re Kullberg* (4). The decision in *Ex parte Boden* (5) did not depend upon notoriety. Moreover, in the present case the consent of the true owner was determined when *Lane* demanded possession on the 1st of June, and that is enough to prevent the operation of the reputed ownership clause : *Ex parte Ward* (6) ; *Ex parte Montagu* (7).

Judgment.

Bacon, C.J. :—

Where the fact of the relation of principal and factor is clearly established, there is no doubt that the order and disposition clause does not apply. In *Ex parte Boden*, which was referred to by the learned Judge of the County Court, the report shews that there was evidence that it was notorious in the neighbourhood that the bankrupt was in the habit of selling stone on commission, and his

(1) 2 D. F. & J. 434.
(2) 1 Ch. D. 631.
(3) 3 Dea. & Ch. 351.
(4) 9 L. T. (N.S.) 460.
(5) 28 Ibid. 174.
(6) Law Rep. 8 Ch. 144.
(7) 1 Ch. D. 554.

books clearly shewed that he was only acting as *Boden's* factor in such sales. These facts are wholly wanting in the present case. *Stephenson*, having carried on business as a separate and independent trader for years, entered into this agreement in January, 1874, that he should become the factor and agent of *Fawcus & Craggs*. That agreement was kept entirely to themselves. There is no pretence for saying that it was notorious, or that *Stephenson* ever changed his character and reputation as an independent seller of timber. He had a name, a commercial name, and this name was never changed. But, for some reason which the Respondent has not attempted to explain, *Fawcus & Craggs* set up an imaginary firm, and called themselves by the name of *Stephenson & Co.*, carrying on *Stephenson's* business, not in their own name but in the name which he had used before. In what honesty could any such agreement have been come to? I have tried to find out some meaning for it, but I can find none. *Stephenson's* reputation in his trade may have made it advisable for them to employ him as their agent. But were the public to be deceived by this imaginary firm? Why were *Fawcus & Craggs* to carry on their trade under another man's name, and then, when they became bankrupt, to say to that other man's creditors that the debts contracted by means of that contrivance were not to be paid? For that is what they really say. Lengthened arguments have been addressed to me upon the agreement; it has been specially pleaded and picked to pieces. Two clauses are taken out of it as being very important, and others are put aside as not having any bearing upon the matter. Because there is a stipulation that the owners of the goods might at any time, notwithstanding the employment of *Stephenson* (who had a right to withdraw from the agency at will), remove the goods remaining unsold, therefore it is said that his lien as factor (which he was as between himself and them) shall not prevail. There is no kind of sense or reason in any such suggestion. That the goods were in *Stephenson's* order and disposition at the commencement of his liquidation, is a fact proved, at least to my satisfaction, and a jury could not hesitate about it for one moment. In his name, by his personal exertions, the trade which he has for years carried on is continued without change or notice of any sort, and he becomes bankrupt, being in possession of these

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goods. It is said that *Fawcus & Craggs* were the true owners of the goods, and I quite agree that they were. But it is equally clear that, with their full consent, *Stephenson* was held out to the public as the real owner of the goods; it was not a mere accidental remaining in his possession; and, unless I am to disregard the evidence of *Henry Fawcus*, his firm of *Fawcus & Fawcus*, when they agreed to draw bills for *Fawcus & Craggs* upon *Stephenson*, were told by *Fawcus & Craggs*, "The bills are perfectly good bills; Mr. *Stephenson* holds timber perfectly sufficient to satisfy this demand, or any other." I think that, so far as any creditor of *Stephenson* is concerned, the operation of the reputed ownership clause is not in the slightest degree affected by the relation of principal and factor between himself and *Fawcus & Craggs*. Then it is said that Mr. *Lane* made such a demand for the timber as to put an end to the consent of the true owner. But what right had Mr. *Lane* to do this? He had no more right to do it than I should have had. He, the prospective receiver under *Fawcus & Craggs*' petition, said to *Stephenson*, "I desire to have possession of these goods." How was that met? *Stephenson* said then, as his trustee says now, "You are not entitled to the goods, because, factor or no factor, I have a lien on them. I have incurred liabilities for you, and debts are due to me from you, and there are £5000 worth of bills outstanding, the funds for the payment of which are to be derived from these goods." Was that demand for possession made by a person entitled to make it, or was it made under such circumstances as would put an end to the notorious fact that the goods were in the order and disposition of *Stephenson*? I think it would be at variance with every principle of law so to hold. What then took place? *Lane*, finding that his demand would not be complied with, came to an agreement, prudent enough in itself, that the goods should remain in the possession of *Stephenson*, that the trade should be carried on by him, and that things should go on just as before. There the matter ended. What took place afterwards cannot in the slightest degree affect the judgment now to be pronounced. It is undisputed that the £8000 are the proceeds of these goods, and that there are £5000 worth of outstanding bills, some of which have been proved, and all of which are provable, against *Stephenson*'s estate. According to

the agreement (which must be read as an entire thing, and not by scraps), the payment of these bills was to be made by the persons on whose behalf they were accepted, and not by *Stephenson*. It is said now that *Stephenson's* creditors, or the funds in which they are interested, are to be made liable for these bills, while the means of paying them are to be taken away. It would require a very strong case, in fact, in law, and in honesty, before I could adopt any such view.

What ought to be done is this: An account must be taken of the bills which were accepted by *Stephenson* after the date of the agreement, and which still remain unpaid. It must be declared that *Stephenson's* estate is entitled to be indemnified out of the proceeds of the timber to that extent, and that, to whatever extent there may be a debt between *Fawcus & Craggs* and *Stephenson*, he is entitled to a lien on the proceeds of the timber.

Solicitors for Appellant: *Maples, Teesdale, & Co.*, agents for *Thomas Steel, Sunderland.*

Solicitors for Respondent: *Shum, Crossman, & Crossman*, agents for *Ralph Bell, West Hartlepool.*

In re CUMBERLAND. *Ex parte* WORTHINGTON.

Proof—Invoice Price of Goods—Discount to be allowed for Cash Payment—Composition—Admission by Debtor of Amount of a Debt.

Wholesale traders supplied goods to a retail dealer on the terms that he was to be allowed a discount of 20 per cent. from the invoice prices on payment in cash within a month:—

Held (reversing the decision of the County Court Judge), that, cash payments not having been made, proof must be admitted in the bankruptcy of the retail dealer for the full amount of the invoice prices of the goods.

Ex parte Pigou (1) not followed.

Semble, that a compounding debtor, who allows a creditor to prove without objection at one of the creditors' meetings for a certain sum, cannot afterwards be heard to dispute that that sum is due to the creditor.

5 C P D 355
356
17 Ch D 449
450

THIS was an appeal from a decision of the Judge of the *Bradford* County Court.

(1) 3 Madd. 136.

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W. S. Cumberland, an ale and porter merchant at *Bradford,* filed a liquidation petition on the 16th of December, 1875. The creditors resolved to accept a composition of 10*s.* in the pound. Messrs. *Worthington & Co.,* brewers at *Burton-on-Trent,* at the first meeting of creditors, proved for £791 2*s.* 9*d.*, which they stated to be due to them for ale sold and delivered to the debtor, and for casks not returned. This proof was not then objected to, and they voted in respect of it. The affidavit of proof stated that *Worthington & Co.* had no security for the debt, except three bills of exchange drawn by them and accepted by the debtor. These bills were for the respective sums of £150, £149 15*s.* 2*d.*, and £100, and they respectively fell due on the 14th of December, 1875; the 14th of January, 1876; and the 14th of February, 1876. They were all dishonoured at maturity. In March, 1876, the trustee appointed under the composition gave notice that he rejected the proof to the extent of £250 1*s.* 7*d.* His reasons for doing so were two: 1. That the bills in question were accepted by the debtor as cash payments on account of the sums which he then owed to *Worthington & Co.,* and for the purpose of entitling him to a discount to which, according to the course of business, he was entitled for cash payment, and that, notwithstanding the dishonour of the bills, *Worthington & Co.* were not entitled to prove for the original amount of the debt. 2. That credit had not been given for certain casks returned. *Worthington & Co.* applied to the Court to reverse the decision of the trustee, and to enforce the payment of the composition. They deposed that the terms upon which they dealt with the debtor were that he was to be allowed a discount of 20 per cent. from the invoice price of all ale sold to him by them on payment by him in cash in one month from the first day of the month following the delivery of the ale, and that the three acceptances were received by them from him because it was not convenient for him to make the monthly payments in cash. They admitted that in calculating the amount of those bills they made him the allowance of 20 per cent., but only on the supposition that the acceptances would be paid at maturity.

Upon the hearing by the Judge it was agreed that the proof should be reduced by £88 15*s.* 3*d.*, the value of certain casks which had been returned to *Worthington & Co.*, and it was ordered

that the proof should be still further reduced by £138 19*s.* 3*d.* (the aggregate amount allowed by *Worthington & Co.* to the debtor in respect of discount on their receiving from him the three acceptances already mentioned and two other acceptances), the Court being of opinion that the debtor was entitled to the benefit of the discounts, notwithstanding the dishonouring of the three acceptances, the discounts being, in the opinion of the Court, trade and not cash discounts, and discounts to which the debtor would be entitled in any event. From this order *Worthington & Co.* appealed so far as it disallowed the £138 19s. 3*d.*

Argument.

Winslow, Q.C., and *C. Gould*, for the Appellants:—

The evidence is clear that this discount was only to be allowed in the event of cash payment being made. Acceptances which are afterwards dishonoured are not cash payment. Moreover, the debtor, having allowed a composition to be accepted by the creditors on the faith of a certain sum being due to *Worthington & Co.*, is bound by that admission. Though the other creditors might perhaps be able to dispute the amount of the debt, the debtor himself cannot.

Safford, for the trustee:—

The acceptances were taken by the Appellants as cash. That in a case like this proof in bankruptcy can only be admitted for the invoice prices of the goods less the discount, is shewn by *Ex parte Aynsworth* (1); *Ex parte Pigou* (2).

Judgment.

BACON, C.J.:—

I cannot go into the question of the difference between trade and cash discounts. In the affidavits I find that only one discount is mentioned. I find this uncontradicted, that the mode of trading between the parties was this, that if the debtor made payment within a month for the goods supplied to him by the Appellants he should be allowed a discount of 20 per cent. Well, then, the parties carried on their business on this footing, and accounts were rendered from time to time in which credit was

(1) 4 Ves. 678. (2) 3 Madd. 136

C. J. B. 1876 *In re* CUMBERLAND. *Ex parte* WORTHINGTON. Judgment.

given for the discount, and the debtor accepted bills of exchange for the amounts due after deducting the discount. But if I owe a man a sum of money and give him a bill of exchange for the amount, I do not satisfy the debt unless I pay the bill of exchange at maturity. If I fail to pay the bill of exchange and he sues me for the full amount, it cannot be said that I have paid him the money because I gave him a bill of exchange for it. It is true that in this case the debtor gave bills of exchange in payment, but, being dishonoured, they became worthless pieces of paper, and the debt was not paid at all. He failed to pay, and the fact that bills of exchange were given cannot make the case any stronger, and I may deal with it as if there had been no such bills. I cannot understand upon what ground the debt can now be disputed, it having been admitted to proof at the meeting for the full amount, and the debtor, when he saw a claim put forward in competition with other creditors for a larger amount than he intended to admit, should at once have objected to it, as it was upon the assumption of a certain total amount of debts being due that the creditors agreed to accept the composition. Upon the facts and evidence before me I decide that the Appellants were entitled to bring an action for the full amount of their claim, and that the debtor could not have insisted upon the discount, because he had not paid for the goods in cash according to his agreement. He could not have pleaded that he had given bills of exchange in payment, because the bills were dishonoured at maturity. The Appellants are entitled to be paid the composition on the full amount of their debt.

Solicitors for Appellants: *Dobinson, Geare, & Son,* agents for *J. & W. J. Drewry, Burton-on-Trent.*

Solicitors for Trustee: *Layton & Jaques,* agents for *A. Neill, Bradford.*

In re PEARSON. *Ex parte* STEPHENS.

C. J. B.
1876
Aug. 7.

Voluntary Settlement—Life Estate reserved to Settlor determinable on Bankruptcy—13 Eliz. c. 5.

In 1858 a man, who was not then engaged in trade, and who owed no debts, made a voluntary settlement of a sum of £1000. The trusts of the deed were, a life estate to himself determinable on bankruptcy, then a life estate to his wife for her separate use, then trusts for the children of the marriage, and an ultimate remainder to the settlor. In 1873 he for the first time engaged in trade. In 1875 he was adjudicated a bankrupt:—

Held, that the settlement was void *in toto* as against the trustee in the bankruptcy.

14 Ch D 266
19 Ch D 573

Statement.

THIS was an appeal from a decision of the Registrar of the *Tunbridge Wells* County Court, acting as Judge.

On the 6th of January, 1858, an indenture was executed between *John Pearson* of the one part, and *Edward Hodge* and *Henry Hodge* of the other part, by which, after a recital that *John Pearson* had recently come into possession under the will of his father of (amongst other things) the sum of £1000, and, being free from debts and liabilities, was desirous of settling the same for the benefit of himself and his wife and family in manner thereinafter appearing, and that the £1000 had been paid over by *Pearson* to *Edward Hodge* and *Henry Hodge*, it was witnessed that, in consideration of the natural love and affection which *Pearson* bore towards his wife and children, it was declared and agreed that *Edward Hodge* and *Henry Hodge*, their executors, administrators, and assigns, should stand possessed of the £1000, upon trust to invest the same as therein mentioned, and to pay the income to *Pearson* until he should assign, charge, or otherwise dispose of the same by way of anticipation, or until he should be found or declared a bankrupt, or become an insolvent debtor within the meaning of some Act of Parliament for the relief of insolvent debtors, or until he should do any other act, or any other event should occur, whereby the same income, if payable to himself, would become vested in some other person or persons, or until his death, which should first happen. But if *Pearson* should assign, charge, or otherwise dispose of the same income by way of anticipation, or

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should become or be declared a bankrupt, or become an insolvent debtor within the meaning of some Act of Parliament for the relief of insolvent debtors, or if he should do some other act, or any other event should happen whereby the same income, if payable to himself, would become vested in some other person or persons, then upon trust that the trustees or trustee should thenceforth pay the income unto *Elizabeth*, the then present wife of *John Pearson*, for her life, for her separate use without power of anticipation. And, subject to these trusts, the whole of the trust fund was to be in trust as therein mentioned for the children or remoter issue of *John Pearson* and *Elizabeth* his wife, as they, or the survivor of them, should appoint, and in default of appointment for the children who should attain twenty-one or marry, in equal shares. The ultimate limitations were, in case *John Pearson* should survive his wife, upon trust for him absolutely, and, in case he should die in her lifetime, upon such trusts as he should by deed or will appoint, and in default of appointment for his next of kin, according to the *Statute of Distributions*, excluding the wife.

John Pearson was not a trader at the date of the execution of the settlement. He did not commence to trade until the beginning of the year 1873, when he became tenant of a public-house, and engaged in the business of a licensed victualler. On the 13th of December, 1875, he was adjudicated a bankrupt. At this time the wife was dead, but there were two children of the marriage living, who were under the age of twenty-one. The trustee in the bankruptcy applied to the Court for an order declaring the settlement void as against the creditors. There was no evidence to shew that *Pearson* was insolvent at the date of the execution of the deed: in fact it was admitted that he owed no debts at that time. The Registrar dismissed the application. The trustee appealed.

Argument.

Doria, and *E. C. Willis*, for the Appellant:—

The limitation over of the bankrupt's life estate in the event of his bankruptcy is at any rate void as against creditors: *Lockyer* v. *Savage* (1); *Higinbotham* v. *Holme* (2); *Ex parte Mackay* (3). But

(1) 2 Str. 947. (2) 19 Ves. 88.
(3) Law Rep. 8 Ch. 643.

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we go further, and contend that this settlement is void *in toto* as against creditors under the statute 13 Eliz. c. 5. At the time when it was executed no one but a trader could be made a bankrupt; therefore the limitation over in the event of bankruptcy shews that the settlor must have contemplated engaging in trade and becoming bankrupt. The object must have been to defeat creditors. Creditors who have become such since the date of the deed have a right to impeach it: *Spirett* v. *Willows* (1). Sect. 91 of the *Bankruptcy Act*, 1869, does not apply to this case.

Finlay Knight, and *E. Baldock Stone*, for the trustees of the settlement:—

As to the life estate of the bankrupt, we submit the point to the Court. But as to the remainder to the children, subject to the bankrupt's life estate, we contend that it is valid. There is nothing to shew, as in *Freeman* v. *Pope* (2), that the settlement must necessarily have had the effect of defeating or delaying creditors. In *Crossley* v. *Elworthy* (3) the settlor was engaged in speculative transactions, and in *Mackay* v. *Douglas* (4) the settlor was about to engage in such transactions. In the present case there is nothing to shew any intention of defeating or delaying creditors except the making the settlor's life estate determinable on bankruptcy. Though that limitation may be itself void as against creditors, there is no authority for saying that its insertion has the effect of making the settlement void *in toto*. Indeed, *Knight* v. *Browne* (5) is, so far as it goes, an authority to the contrary.

Judgment.

BACON, C.J.:—

This deed is plainly fraudulent upon the face of it. What is the meaning of it? The settlor in effect says, "I have got £1000; I do not intend my creditors to have a farthing of it; and to accomplish that purpose I will settle it in such a way that, if by any accident my creditors should hereafter have a claim to it, it shall go to some one else." That is as plainly fraudulent as possible.

(1) 3 D. J. & S. 293. 11 Jur. N.S. 570 (3) Law Rep. 12 Eq. 158.
(2) Law Rep. 5 Ch. 538. (4) Ibid. 14 Eq. 106.
(5) 30 L. J. (Ch.) 649. 7 Jur. N.S. 894

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Sect. 91 of the *Bankruptcy Act* has nothing to do with the case. Nor has the case of *Knight* v. *Browne* (1) any application, for it related to a marriage settlement. In the present case I think that the settlement is plainly fraudulent, for the law says that it is fraudulent for a man so to deal with his property as to disappoint the just claims of his creditors. The deed must be declared void, but the costs of all parties must be paid out of the fund.

Solicitor for Appellant: *John Burton, Serjeants' Inn* and *Tunbridge Wells.*

Solicitors for Respondents: *Collyer-Bristow, Withers, & Russell,* agents for *Stone & Simpson, Tunbridge Wells.*

C. J. B. 1876 *Aug.* 7.

In re BRYANT.

Application to commit for Contempt of Court—Power of Court to abridge Length of Notice—Bankruptcy Rules, 1870, *r.* 179.

The Court has no power under rule 179 of the Bankruptcy Rules, 1870, to abridge the three days' notice which is to be given of the hearing of an application to commit for contempt of Court.

Statement.

FINLAY KNIGHT, on behalf of the receiver who had been appointed in this matter, applied *ex parte* to the Court to allow notice to be served of the hearing on the next day, the 8th of August, of an application to commit a person for breach of an injunction. The object was to have the application heard before the rising of the Court for the Long Vacation. He suggested that the Court had power to abridge the length of notice required by rule 179 (2).

(1) 30 L. J. (Ch.) 649.

(2) Rule 178: "An application to the Court to commit any person for contempt of Court shall be supported by affidavit, and be filed in the Court in which the proceedings are."

Rule 179: "Upon the filing of such application the Registrar shall fix a time and place for the Court to hear the application, and shall issue a notice to be served by an officer or high bailiff of the Court personally on the person sought to be committed three days at the least before the day of hearing the application, unless the Court shall, by order upon good cause shewn, direct service of the notice to be made in some other manner, in which case it shall be served together with a copy of the order in the manner so directed."

BACON, C.J.:—

The rule only says that the Court may direct service to be made in some other manner, *i.e.*, other than personally; it says nothing about fixing some other time for the notice. Considering the tenderness with which this Court, and indeed every other Court, always treats applications to commit persons to prison, I think it would be contrary to all principle if I were to abridge the length of notice fixed by the rule.

Solicitors: *Harper, Broad, & Battock.*

C. A.
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V.-C. B.
March 16, 17.
C. A.
July 3, 4.

BRADBURN *v.* MORRIS.

[1874 B. 364.]

MORRIS *v.* BRADBURN.

[1874 M. 143.]

Easement—Right of Way—Increase of Servitude—Agricultural User—Mining User—Use of Occupation Road—Change of Use—Present Use—Injunction.

User for twenty years of a way to a field used only for agricultural purposes does not give a right of way for mineral purposes.

The owner of a field, with a right of way to it through an occupation road, agreed to sell the surface of the field (reserving the minerals). The field had never been used for mining, and the vendor did not appear to have any present intention of working the minerals:—

Held, that the vendor, having had a right to use the road for agricultural purposes only, could not prevent the purchaser from so altering the road as to make it unfit for the use of the vendor in working the minerals under the land agreed to be sold:

Held, also, that even if the vendor had a right to use the road for minerals, inasmuch as he had no present intention of working the minerals, the Court would not interfere.

Quære, per Mellish, L.J., whether, where an occupation road follows the boundary of two estates so as to afford a presumption of ownership *ad medium filum*, each owner has not the right to use the road for all purposes though the actual user has been only for limited purposes.

Decision of *Bacon*, V.C., reversed.

Statement.

JOHN MORRIS was the owner of a field near *Wednesfield*, in the county of *Stafford*, the only approach to which was by an occupation road. *Morris* had used the road for more than twenty years as a means of access to his field. The field had been used for agricultural purposes only, no mine having ever been opened upon it. The land on one side of the road was the property of the Duke of *Cleveland*, and part of the land on the other side had formerly belonged to *Morris*, and had been sold by him to *Bradburn* with a reservation of mines. It was alleged by *Bradburn* that the soil of the road belonged to the Duke of *Cleveland*, and *Morris*, in answer to interrogatories, said that he did not know whether it belonged to the Duke or to whom it belonged. He did not in his pleadings or evidence suggest that any part of the soil in the road had ever belonged to himself. The ownership

of the Duke was not formally proved, but the Duke's agent made an affidavit stating that to the best of his belief the soil of the road was the Duke's property, except that a canal company claimed the property in a bridge by which the road crossed their canal. *Bradburn* and one or two other persons had also for more than twenty years used the road as a means of access to land belonging to them for agricultural purposes. Some years before there seemed to have been a temporary user of the road for conveying minerals from lands occupied by the Duke's tenants, but this had been discontinued before the present dispute arose, and it was not alleged that any one had acquired a prescriptive right by user for mineral purposes. The only user of the road for any other purposes than those above stated was by *Bradburn*, who had been allowed by the Duke's agent to use it for the purposes of a manure manufactory belonging to him. *Bradburn's* works lay on the further side of the canal from *Morris's* field, and some time before the agreement *Bradburn* had been allowed by the Duke's agent to construct a branch railway along the road from his works to a station which was situated between *Morris's* field and the works. *Bradburn* had also purchased from the canal company the right to carry his railroad across their bridge. In constructing the railroad *Bradburn* had altered the levels of the road, making the gradients easier in some places and more severe in others. He had also, with the approval of the Duke's agent, widened the road by taking in an additional strip on the side on which the Duke's land lay, but across the canal bridge the width of the road remained unaltered, so that no traffic could pass over while *Bradburn's* trucks were on the bridge. While these works were in progress *Morris* had occasionally protested against *Bradburn's* interference with the road, and *Bradburn* had, at his instance, removed temporary obstructions which he had put upon it. The railroad and works were nearly or quite completed at considerable expense (with the exception of some new fences to the enlarged road and some improvements in its level which had been since made) when the question in these suits arose under the following circumstances:—There was a pending action by *Morris* against *Bradburn* for fouling a stream to the injury of *Morris's* field, and at the trial, which came on upon the 13th of March,

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1873, the action was compromised by an agreement that *Bradburn* should buy either the surface only of *Morris's* field or the surface with the mines under it, and the mines reserved on the former sales by *Morris* to *Bradburn*. If *Bradburn* elected to buy the surface only (which he afterwards did), power was to be reserved to *Morris* to work the mines. The price was to be fixed by Mr. *Hill*, Q.C., who was also to settle the terms on which *Morris* was to work the mines. Mr. *Hill* awarded the price and settled a clause reserving to *Morris* rights of way and surface-user, and other facilities over the field for working the mines. During the discussion before the arbitrator *Morris* had claimed to have inserted in the conveyance of the field an express reservation of a right of way over the occupation road for the purpose of working the mines reserved. This clause Mr. *Hill* declined to insert, according to *Morris's* contention, on the ground that it was a matter outside the reference, and, according to *Bradburn's* contention, on the ground that *Morris* was not entitled to a reservation of a right of way which did not belong to him at the date of the agreement between him and *Bradburn*. Evidence was gone into as to what passed before the arbitrator, but this part of the case ultimately became unimportant by both parties agreeing, on the suggestion of the Court of Appeal, to have a clause inserted to the effect that nothing in the conveyance should affect the right of *Morris* to use the road for any purpose for which he might have lawfully used it before the agreement.

The bill in *Morris* v. *Bradburn* was first filed, alleging more than twenty years user of the road, and also that it was a way of necessity, and praying specific performance of the agreement of the 13th of March, 1873, with a declaration that a clause should be inserted in the conveyance reserving the right to use the road for mineral purposes. It offered to perform the agreement with such a reservation. It also prayed a mandatory injunction to restrain *Bradburn* from allowing the railroad to continue on the road, or permitting the road to continue obstructed.

The cross bill alleged that the user of the road by *Morris* was for agricultural purposes only, and prayed specific performance and execution of the conveyance, with the reservation clause as to minerals which the arbitrator had settled.

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Much evidence was gone into to the effect of the facts already stated, and also as to the alleged injury done to the road, and other matters. This evidence is stated in the judgments so far as material.

The causes came on to be heard before Vice-Chancellor *Bacon* on the 16th and 17th of March, 1876. *Morris* having amended his bill since the filing of the cross bill, *Bradburn* v. *Morris* became the first cause.

Argument.

Hemming, Q.C., and *Maidlow*, for *Bradburn*:—

First: The whole question as to what reservation should be inserted in the conveyance was referred to the arbitrator and decided by him, and we are therefore entitled to a decree for specific performance on that footing in our suit.

Secondly: Independently of the award, we should be equally entitled on the merits.

Morris never, at any time, acquired a right to use the road for mineral purposes, and he cannot claim to reserve anything out of his grant, which was not in him when he sold to us, and is not in him now. To call this a way of necessity is idle. A way of necessity arises when a man acquires land from a grantor who owns the surrounding land, and it is not alleged here that *Morris* so acquired this field. There is no such doctrine as that a man with an inaccessible close is *ipso facto* entitled to a way over the land of a neighbour from whom he has not bought: *Wms. Saund.* (1); *Bullard* v. *Harrison* (2); *Holmes* v. *Goring* (3); *Gayford* v. *Moffat* (4); *Gale* on Easements (5). The sole question is whether twenty years' user of a road for farming purposes gives a right to use it for mineral purposes, and it is settled by authority that it does not. The rule is that the owner of the dominant tenement cannot, by changing the character of the occupation of the land in respect of which the right of way or easement exists, impose a greater servitude upon the owner of the servient tenement: *Wimbledon and Putney Commons Conservators* v. *Dixon* (6); *Williams* v. *James* (7); *Cowling* v. *Higginson* (8). The *Wimbledon*

(1) Vol. i., p. 323.
(2) 4 M. & S. 387.
(3) 2 Bing. 76.
(4) Law Rep. 4 Ch. 133.
(5) 5th Ed. p. 143, n.
(6) 1 Ch. D. 362.
(7) Law Rep. 2 C. P. 577.
(8) 4 M. & W. 245.

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case, decided that it would be an unlawful increase of the servitude to turn a farm road into an approach to a building estate, and to convert it into a road for mining purposes would be much worse. If there had been old open mines in the field there might have been room for argument; but there was nothing of the kind. It follows that *Morris* ceased to have any interest in the road when he sold to *Bradburn* the surface of his field, for which alone he had the right to use it. His bill, therefore, ought to be dismissed.

Kay, Q.C., and *F. G. Bagshawe*, for the Plaintiff *Morris*:—

The Defendant admits that he is bound to give the Plaintiff every facility for getting at the mines as between himself and the Plaintiff, but insists on rendering that facility nugatory.

The other adjoining landowners, especially the *dominus*, the Duke of *Cleveland*, might possibly limit our use of the occupation road as the Defendant seeks to limit it; but the Defendant, who has bought the surface, and contracted to give the Plaintiff every facility for using the road over the land which he has purchased, is bound by his contract, and cannot dispute or derogate from the right which has been expressly reserved to the Plaintiff. The right of access being reserved to the Plaintiff, it is reserved for all purposes whatever to which he may choose to apply it: *Proud* v. *Bates* (1); *Duke of Hamilton* v. *Graham* (2); *Ballacorkish Silver Mining Company* v. *Harrison* (3). Putting a tramway upon an occupation road is a trespass which, as an act rendering the road dangerous and inconvenient, will be restrained by injunction: *Neath Canal Company* v. *Ynisarwed Resolven Colliery Company* (4); *Attorney-General* v. *Widnes Railway Company* (5); *Reg.* v. *Train* (6); and the Defendant is not entitled to alter the nature of the road and interfere in that manner with its use by the Plaintiff: *Pit* v. *Lady Claverinth* (7).

Hemming, in reply.

(1) 34 L. J. (Ch.) 406.
(2) Law Rep. 2 H. L., Sc. 166.
(3) Ibid. 5 P. C. 49.
(4) Law Rep. 10 Ch. 450.
(5) 22 W. R. 607.
(6) 2 B. & S. 640.
(7) 1 Bar. 318.

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BACON, V.C., after stating the facts of the case, and stating that it was not true that everything was concluded by the award of Mr. *Hill*, continued:—

Morris was unquestionably the sole owner of the land and also of other lands, and he had enjoyed and was in the enjoyment of a way over what is called an occupation road. What he had was the subject of a contract between him and *Bradburn*. A right of way was as much a part of the thing bargained for as either the mines or the surface, or both together. There were three things at least which were the subject of the contract—the surface, the mines, and the right of way. The right of way in words is not only not interfered with or even mentioned or referred to in any way, but it could not, in the nature of things, be so; for after the option was declared it became a contract for the purchase of a portion of the entire thing, but not of anything which *Morris* was not paid for and did not agree to sell. It is entirely new for me to hear it said that if an owner of a close containing mines has a right of access to that close, he is limited to the use of that close for agricultural purposes alone. There is no decision that I know of to that effect. *Wimbledon and Putney Commons Conservators* v. *Dixon* (1) has been referred to, but that case has no application, however remote, to the case now before me. That was a case between the *domini* of the land and the persons who claimed the right to a servitude imposed upon that land. Between them the question was decided that, except for agricultural purposes, and any other reasonable use, the *domini* had a right to restrain the enlargement of the servitude; and the enlargement in that case being the erection of buildings, the Lord Justice said in his judgment that that would be an enlargement of the servitude. I have not here the Duke of *Cleveland* litigating, as the *domini* were litigating in that case. I have no means of deciding to what extent this right of way is one which in point of law can be asserted against the Duke of *Cleveland*, but I must treat it on the assumption that beyond all question the Duke of *Cleveland* has never in any way laid claim or asserted a right to this occupation road, either by possession by himself or by the interposition of others; and that the Duke makes no claim to this right of way;

(1) 1 Ch. D. 362.

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and if he does not, and should never do so, then the right of way is as much a part of the thing bargained for and sold as either the surface or the minerals. It was inseparable from the entirety of *Morris's* property before the contract was entered into. He has parted with a portion of it and a portion only, and the very terms and tenor of the contract shew that he was to have the power to work his mines if, in the event which has happened, *Bradburn* did not choose to buy. I cannot conceive, therefore, that the case of *Wimbledon and Putney Commons Conservators* v. *Dixon* (1) has any application to the case before me. I have no parties before me so as to enable me to adjudicate on such rights as were decided in that case; all I have to say is whether, in the exercise of the jurisdiction which this Court exercises in the way of specific performance, I am to admit *Bradburn* and to exclude *Morris* from something which is not included in their contract. I find it impossible to do so. I think *Morris* is as well entitled to-day as he was before that agreement was entered into, to the enjoyment of the mines beneath his land.

[His Lordship then expressed his opinion that there had been no mistake or omission by Mr. *Hill*. *Morris's* right to use the land for agricultural purposes was clear, and His Lordship would not impute to *Bradburn* so dishonest an intention as an intention to buy the surface only, and then block up the road, so as to prevent *Morris* from using it for his mines. It was to be sold as it stood, and *Bradburn* in laying down this tramway and obstructing the road was departing from his bargain. *Morris* was entitled to have the road as it was before he sold the land. His Lordship then continued:—]

Then, as to the further relief asked, against permitting the road to remain at any other level than it was in and prior to 1871, and against permitting the tramway to remain on the said road, and from constructing any other tramway or railway thereon. It is said that the tramway is not a nuisance. *Reg.* v. *Train* (2) has been referred to. No doubt that was a case of public nuisance, but the facts in this case amount to a wilful obstruction of the road; and although this is not a public nuisance, yet, as between these parties, in my opinion a nuisance has been committed by

(1) 1 Ch. D. 362. (2) 2 B. & S. 640.

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the one against the other, which entitles *Morris* to the relief prayed by his bill. As to the second suit, every single point which was at issue between the parties was distinctly raised, and must have been decided in the first suit, and I cannot conceive, and certainly no reason has been given, why so unnecessary a proceeding as that of filing a cross bill has been resorted to.

For these reasons, I am of opinion that *Morris*, when he asks to have the unobstructed use of the way which is the access to his field, which he had before he sold that field, and which he did not sell when he sold a portion of his property, for he did not sell any part of the right of way which he wanted himself for the purpose of working his mines, is entitled to have things restored to their original condition. It is not necessary to be so strict as to say that the road must be restored to the same level as it was before, but it is necessary to say that the road must be restored to a state in which it presents no such obstruction as did not exist before to *Morris* working his mines. I think, as it is clearly proved that the tramway is a dangerous obstruction to that right of way over the occupation road, the Defendant *Bradburn* is bound to remove his tramway. About this I had some doubt at first. I thought it was possible that the tramway might remain, and that some compromise might be made between the parties upon that matter, but upon considering it further I am of opinion that the existence of a tramway upon so narrow a road as this, especially when it crosses a bridge, is a nuisance and obstruction inconsistent with the contract between the parties, and must be abated in order specifically to perform the contract between the parties. And inasmuch as the second bill was, in my opinion, wholly unnecessary, that must be dismissed with costs. Upon *Morris's* bill, he is entitled to a decree such as I have described, and he is entitled to the costs of the suit.

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From this decree *Bradburn* appealed, and the appeal came on to be heard on the 3rd of July, 1876.

Argument.

Hemming, Q.C., and *Maidlow*, for the Appellant, used the same arguments as in the Court below.

Kay, Q.C., and *F. G. Bagshawe*, for the Respondent, in addition

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to the arguments used in the Court below, objected that *Bradburn* had not proved that the soil of the road was the property of the Duke, and contended that it must be presumed that the soil *ad medium filum* belonged to the owners of the land on the side opposite to the Duke's estate, of whom *Morris* was formerly one. *Morris*, therefore, was entitled to the road as being partially on his own soil, and this right, so far as mines were concerned, he had never parted with, because on his former sales to *Bradburn* of the land adjoining the road he had reserved the minerals, and with them, consequently, his old right to use the road for getting them.

Hemming, in reply :—

The pleadings and evidence amount to an admission by *Morris* that the soil of the road is not in him. His claim is founded on easement and on nothing else. If necessary, there can be an inquiry as to the ownership, but *Morris* comes here as Plaintiff, and asks for the injunction, which is the one substantial subject of dispute. If he relies on ownership of the road, he must allege and prove it. If he had alleged it we should probably have disproved it more formally. As it is, we have done enough.

In the course of the argument *James*, L.J., suggested a clause to be put into the lease to the effect stated below. This was accepted by both parties.

Judgment, C. A. James, L.J.

JAMES, L.J. :—

In this case the real dispute between the parties was the claim on the part of *Morris* to compel *Bradburn* to remove the railroad or tramroad by means of which *Bradburn* was carrying on his own manufactory, and *Morris* succeeded in obtaining from the Vice-Chancellor a mandatory injunction accordingly. In order to sustain that mandatory injunction *Morris* must clearly make out that what *Bradburn* is doing is an infringement, and such an infringement of his legal rights as to entitle him to that interposition of the Court. The burden of proof is upon *Morris* in that respect.

Now *Bradburn's* case is this. He says, "I admit there was an

occupation road, I admit that I have laid rails upon that occupation road, but I have done it upon that which I say is the Duke of *Cleveland's* land, and with the assent of the Duke of *Cleveland* so far as it was his land. On a small part of it, I have done it on the canal company's land with the assent of the canal company, and you have not established on the part of the canal company, or upon the part of the Duke of *Cleveland*, any right whatever to interfere with what I have done."

The right which *Morris* alleged was a right to have access along this occupation road to a piece of land for mineral purposes if and when he should require to use it for these mineral purposes. At present there is no evidence before us that he is at all likely for some considerable time to use the road for the purpose of getting at the mines which he has excepted and reserved to himself in the manner in which he wishes his rights to be reserved in the conveyance to be made. It would have been a very strong thing, even if his title had been clearer than it is, to interfere with the actual present use by a manufacturer of his own property for the purpose of his manufactory, using it in the way most convenient to himself for the usual and proper mode of getting connection between his works and the railway; it would have been a very strong thing to interfere with that merely because it might at some future time, if this was continued in the same way, interfere with other rights which might then be exercised by the Plaintiff *Morris*.

But, independently of that, it appears to me that *Morris* was bound to make out to our satisfaction that he had the right which he claimed, and that the right was and had been interfered with by *Bradburn*. Now, he certainly has not proved at all satisfactorily—indeed, he has not proved, as it seems to me, in any way—the use of this occupation road for the purposes which he alleged as against the Duke of *Cleveland* or as against the canal company; he has not proved it by any satisfactory evidence—the *onus probandi* being upon him—as against *Bradburn* himself as the owner of the two pieces of land. Under those circumstances *Morris* has really failed to prove that which was incumbent on him to prove, and therefore he is not entitled to the mandatory injunction, or to any such injunction as he has asked for.

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There is another point, with regard to the frame of the conveyance. *Morris* says: "I was the owner of a piece of ground to which there was an occupation road. I have parted with the surface of that ground to *Bradburn*, and have reserved to myself the minerals under the surface. By doing that I did not mean to interfere with my right in any way; whatever right I had with regard to the occupation road, for any purpose connected with the property, whether as to the surface or as to the minerals, I did not mean to part with." But he had no power to give himself any rights additional to those which he then had, though he had a right to have it made clear that he was not, by parting with the surface of the land, in any way depriving himself of any right which he then had as owner of the whole to use the occupation road for any purposes for which he might then have lawfully used it. Therefore I propose to insert in the conveyance a declaration in the words I have mentioned. That would reserve any right he had against *Bradburn* or the Duke of *Cleveland*, and we do not prejudice that right in any way whatever; we merely preserve the thing to him in *statu quo*.

The insertion of those words would never, I am satisfied, hav been objected to on behalf of *Bradburn*, and the whole of the suits on both sides seem to me to have been occasioned by a contention of *Morris* that he had a right to have the rails removed by the interposition of this Court. Having failed in that, which was the substantial matter in litigation between them, I am of opinion that *Morris* must pay *Bradburn's* costs.

Mellish, L.J.

MELLISH, L.J.:—

I am of the same opinion. I think that, with reference to the right that *Morris* has to the use of the occupation road, whatever right he had to use the occupation road for the purpose of working the minerals under the surface of the land which he had sold to *Bradburn*, he is entitled to have reserved to him; but if he had, at the time when he owned both the surface and the minerals, no right to use the occupation road for the purpose of working the minerals, I do not see how he can have obtained that right by his agreement with *Bradburn*.

As far as regards the main question in this case, whether there

ought to be a mandatory injunction to remove these rails, it appears to me that *Morris* must make out that he actually had at the time when he owned both surface and minerals a right to use this occupation road for the purpose of getting his minerals. Secondly, he must prove that he does now want to get his minerals, and that the railway as it exists is an obstruction to him. Now, in my opinion, the evidence before us leaves it extremely doubtful as to what the extent of right over the occupation road is. If it had been proved clearly that *Morris* wanted immediately to get his minerals, possibly we should have thought it right that there should be a further inquiry as to what were the particular rights of *Morris* over this occupation road. But inasmuch as there is no satisfactory evidence that he wants at the present time to get the minerals, and as he also, in my opinion, has not by the evidence now before us made out at all satisfactorily what are his rights as to the occupation road, I do not think it would be proper now to have an inquiry which might be merely speculative. The way in which he appears to have put his case in the bill is that he had by way of easement a right of way to these lands at the end of this road. As to that, his evidence simply means that for a period of twenty years or more the occupier of these lands had used the occupation road for purely agricultural purposes. Now, according to our decision in the case of *Wimbledon and Putney Commons Conservators* v. *Dixon* (1), that is not of itself sufficient to prove a right to use the road for the purpose of getting minerals, no minerals having, as far as the evidence goes, ever been got upon the lands now in question. But then it is put very forcibly that this occupation road being in part bounded by the property of the Duke of *Cleveland* on one side and by the property of other persons on the other, there was a *primâ facie* presumption that the boundary between the two properties was the *medium filum* of the road. In that state of things, if each party had given up his own portion in order that there might be a road for their common advantage, I am not prepared to say that possibly that would not be a road for all purposes: because of course a man would be entitled to use his half of the road for any purpose that he liked, and I do not see

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how you could restrict the user of the whole road. It would not come within the general rule that you were putting a greater burden upon the servient tenement, because the one tenement is in that point of view as much a dominant tenement as the other, and they would mutually get the advantage of having the right of way and using it for all purposes.

Judgment, C. A. Mellish, L.J.

But I am convinced that it is quite an afterthought to put *Morris's* case in that way—that is not the way it is put in his bill. *Bradburn's* attention was not called to this, and it is impossible to say that if his attention had been called to it he might not have got possibly perfectly clear evidence that the whole of the occupation way was the Duke of *Cleveland's*. To my mind, the burden of proof being upon *Morris*, he has not satisfied me that he has that right, and certainly we cannot grant a mandatory injunction unless he has clearly made out his right, and I think also unless he made out that he had a present want of using the road. On the whole, I am of opinion that he has not made out his case.

Baggallay, J.A.

BAGGALLAY, J.A.:—

I am of the same opinion. [His Lordship then stated the facts of the case.]

It is unnecessary further to consider the question of the reservation in the conveyance, because a declaration which the Lord Justice suggested has been accepted by both parties. I am bound to say that in my opinion the draft conveyance which was originally prepared would have been sufficient without that addition; but, inasmuch as disputes have arisen between the parties, it is desirable that the precise terms should be inserted in the conveyance, in order to prevent further disputes. As pointed out by the Lord Justice, the real cause of the dispute has been the assertion of a right on the part of *Morris* to have the tramway removed from the occupation road. Now it appears to me that there is no foundation whatever made in the pleadings in this suit for obtaining an injunction to that effect. The right and the title which have been asserted at the Bar, and which appear to have been really asserted by the pleadings, are disputed, and I am unable to see on what grounds any such injunction could have been granted. If there is any such right in the Plaintiff *Morris*,

and if at any future time there should be an interruption of any right to which he is entitled as to the use of that road for carrying on his mineral business, then would be the proper time to apply either by an action for damages in respect of the interruption or for a mandatory injunction, if he can obtain it.

MINUTES:—Reverse the decree of 17 March, 1876. Order that the bill in *Morris* v. *Bradburn* be dismissed with costs. Order that, upon *Bradburn* paying to *Morris* £2230, the purchase-money for the surface of the land with interest, *Morris* do execute a proper conveyance of the surface only of the land to *Bradburn*, such conveyance to contain a proper reservation of the mines and minerals to *Morris*, and contain a clause in the following words: "Nothing herein contained shall extend to affect any right of the said *John Morris*, his heirs, executors, administrators, or assigns, to use the occupation road leading to the *Wolverhampton* and *Wednesfield* main road for all or any purposes for which on the 13th of March, 1873, he might have lawfully used it." *Morris* to pay to *Bradburn* the costs of *Bradburn* v. *Morris* and of the appeal.

Solicitor for *Morris*: *H. G. Field*, agent for *T. Waterhouse, Wolverhampton.*

Solicitor for *Bradburn*: *J. M. Chamberlain*, agent for *J. C. Smith, Wolverhampton.*

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EARDLEY *v.* GRANVILLE.

[1874 E. 63.]

Copyholds—Mines and Minerals, Lessee of—Possession of Soil by Copyholder—Carriage of Non-manorial Minerals over and under Copyholds—Acquiescence—Injunction.

5 Ch D. 755. 21 Ch D 33.

In an ordinary copyhold manor the estate of the copyholder is in the soil throughout except as regards trees, mines, and minerals, the property in which remains in the lord. When the lord has removed minerals the space left belongs to the copyholder. The right of the lord is not like that of a vendor of freeholds who has reserved mines, and remains the owner of the vacant space from which minerals have been removed.

In a Crown manor, where the Crown and its lessees were by custom entitled to enter on the land for the purpose of working the minerals, the Defendant, the lessee of the Crown mines, who was also lessee of the *S.* mine outside the manor, claimed a right to use a crut or underground way beneath the land of the Plaintiffs, who were copyholders of part of the manor, for the purpose of conveying minerals from the *S.* mine to the deep pit by which the manorial mines were worked, and thence by a branch railway constructed by the Defendant over part of the same copyhold to the main line:—

Held, that such user was a trespass, and that, no case of acquiescence on the part of the Plaintiffs or their predecessor in title having been established, they were entitled to an injunction to restrain the Defendant from carrying the *S.* minerals over or under their copyhold land.

Statement.

THE Plaintiffs were copyholders of part of the manor of *Newcastle-under-Lyne*, as successors in title of one *Ann Adams*.

The Crown, in right of the Duchy of *Lancaster*, was seised in fee of the said manor, and of the collieries, mines, seams of coal, and minerals lying beneath the surface of all lands within the manor or lordship. The Defendant, Earl *Granville*, was lessee under the Crown of the said collieries, mines, and minerals.

The Defendant alleged that from time immemorial the Crown and its lessees had the right to work the collieries and mines, and for that purpose to enter upon the lands and on such parts of the surface (not being land covered with buildings) as might be required for the purpose of working the mines, making to the tenants and occupiers reasonable compensation; and that such right had been exercised by the Crown and its lessees beyond the

time of legal memory, and that the copyhold tenants of the manor held their tenements subject to such custom.

The Defendant's predecessors in title had from the year 1731 been lessees, under the Crown, of the said collieries, mines, and minerals, under successive leases for thirty-one years, renewed from time to time, and conferring on the lessees the power to exercise the rights belonging to the Crown.

In 1852 the Defendant was lessee under a lease of the 18th of August, 1826, and was working the mines by a pit called "the deep pit."

On one side of the manor was a tract of freehold land then belonging to *Ralph Sneyd*, containing mines, and beyond *Sneyd's* land there was some freehold land then belonging to *Ann Adams*, who was also at that time copyholder of part of the manor between the deep pit and *Sneyd's* freehold.

In 1851 *Ralph Sneyd* demised mines lying beyond the manor to one *Stanier*, who, by an underlease of the 30th of November, 1852, demised the same to the Defendant for thirty years.

At the date of the said underlease the Defendant was constructing a branch railway from the deep pit within the manor across the copyhold land of *Ann Adams* and *Sneyd's* freehold to effect a junction with the *North Staffordshire Railway* at *Etruria*. In order to complete this railway it was necessary to carry it across the freehold land of *Ann Adams*, who, by a lease dated the 10th of December, 1852 (the works having then been begun), demised to the Defendant part of her freehold, containing 2500 square yards, with power to construct a railway thereon, with the necessary works, and to use the same for the term of thirty years from the 29th of September, 1852, at the yearly rent of £30, and it was thereby agreed that the Defendant should within two years complete the railway, and that the same should be used for the conveyance of coal and minerals from any lands or mines belonging to or occupied by the Defendant, or from any lands or mines belonging to *Sneyd*, and for no other purposes except to carry coal or minerals belonging to *Ann Adams*, her heirs or assigns, as therein mentioned, to the *North Staffordshire Railway*.

By a renewed lease from the Crown, dated the 27th of September, 1855, the manorial collieries, mines, and minerals, were

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demised to the Defendant for the term of thirty-one years from the 29th of September, 1854, at the rents and royalties thereby reserved, and subject to the payment of way-leave for minerals not the property of the Crown which should be brought through or worked by means of any of the pits made under the powers of the lease, or of any previous lease from the Crown, such way-leave not to extend to any coal or minerals brought from the lands of *Sneyd* so long as the coal and minerals belonging to the Crown were permitted to be brought without charge through the pits or underground ways made under *Sneyd's* lands.

The Plaintiffs, by their bill, filed in July, 1874, alleged that they had lately discovered that the Defendant had, by means of the said railway across the Plaintiffs' copyholds, since the 25th of March then last, conveyed large quantities of coal and ironstone from the mouth of the deep pit (which was sunk in copyhold land adjoining the Plantiffs') to the *North Staffordshire Railway*.

The Plaintiffs also alleged that they had lately discovered that the Defendant had for some time past been working or getting the coal and ironstone from the *Sneyd* mines, and had brought the same to the mouth of the deep pit by conveying them by an underground road or crut driven through the subsoil of the Plaintiffs' copyhold, which subsoil consisted partly of seams of coal and partly of seams of clay.

The bill prayed, first, that the Defendant might be restrained by injunction from conveying any coal or other produce of the *Sneyd* mines underneath the Plaintiffs' copyhold lands, and from making, or using, or allowing any road or way to remain underneath the Plaintiffs' copyhold lands for the purpose of conveying any such coal or other produce; secondly, that the Defendant might be restrained from using or continuing to use any part of the surface of the Plaintiffs' copyhold land for the purpose of a railway for conveying any coal or ironstone of the *Sneyd* freehold lands, and for consequential relief.

The Defendant, by his answer, stated that the taking a lease of the mines under the *Sneyd* estate, and the taking a lease from *Ann Adams* of a right to make a railway over her freehold property, and the construction of a complete line from the deep pit over her copyhold, were parts of one scheme for the purpose of

developing and working the mines and minerals in contemplation of the renewal of the Crown lease; and he submitted that by the said lease *Ann Adams* gave him permission to construct the railway over her copyhold land, and to use it for the purpose of conveying minerals not only from the Crown collieries but also from the *Sneyd* estate. He further stated that he had paid to the occupying tenant of the copyhold a small yearly sum as compensation for the user of the surface.

Statement.

The Defendant further stated that the deep pit was sunk in 1848 in a piece of copyhold land adjoining that of *Ann Adams*, and was used by the Defendant in working the mines held under the Crown, and also for working the mines under the *Sneyd* estate; that the coal and minerals from the Crown property were sometimes conveyed in carts from the pit's mouth and sometimes by means of the Defendant's railway from the mouth of the pit to the *North Staffordshire Railway*, and some of such minerals (both Crown and *Sneyd* indiscriminately) were conveyed by the underground road or crut, which was constructed after the date of the lease of the 10th of December, 1852, through the mineral ground at a depth of 500 yards below the surface of *Ann Adams'* copyhold land to the bottom of the pit, and were thence raised to the surface.

The Defendant further stated that the use of the railway and the underground passage had been notorious for above twenty years, also that the mineral ground beneath the Plaintiffs' copyhold land where the crut had been made consisted partly of seams of coal and ironstone, and partly of strata of clay, all which seams and strata belonged, as he was advised, to the Crown, and that the right to work and get, and also to use, such seams and strata was vested in him as lessee from the Crown; and that he claimed the right to use such underground passage for bringing minerals from the *Sneyd* estate for assisting him in working the mines thereunder by virtue of the express provisions of the Crown lease, by which permission was given him to convey minerals from the *Sneyd* estate without paying any way-leave for the same.

Southgate, Q.C., and *C. Batten*, for the Plaintiffs:—

Argument.

The Defendant, as lessee under the Crown, is only entitled to

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use the railway over the Plaintiffs' lands and the underground road for the purpose of carrying the Crown minerals, not those worked in the *Sneyd* mines, which are outside the manor.

Although the property in mines under copyhold lands is in the lord, the possession of the lands is in the tenant, who can maintain trespass in respect of an unauthorized use of his lands: *Lewis* v. *Branthwaite* (1); *Keyse* v. *Powell* (2).

In *Bowser* v. *Maclean* (3) it was held that the lord of a manor might drive carriages along a tramway under copyholds of the manor for the purpose of working mines within the manor, but not of working mines beyond its limits.

The cases which relate to the rights of a lessor of freehold land who has reserved mines and minerals from the demise do not apply. In *Proud* v. *Bates* (4), where the lord of a manor had granted a lease of waste land of a manor with a reservation of the mines, with power to work them and with free way-leave to and from the same, it was held that the lessor and those claiming under him were entitled to an absolute way-leave for minerals not under the demised property. That case, however, will not support the Defendant's contention, and does not apply to the case of a copyholder who is entitled to the soil as well as the surface. So, likewise, the case of *Duke of Hamilton* v. *Graham* (5) has no application.

In *Goodson* v. *Richardson* (6) the Court granted an injunction to restrain the continuance of water-pipes which had been laid in the soil of a highway without the consent of the owner of the soil. In like manner we contend that the carrying of minerals from the *Sneyd* mines over or under the Plaintiffs' land is a trespass which they are entitled to come to this Court to restrain.

The defence on the ground of acquiescence cannot be sustained.

Chitty, Q.C., and *Cozens-Hardy*, for the Defendant:—

When a manor contains minerals which are the property of the lord, he and his lessees are entitled to work them in any way he thinks best; the Defendant, therefore, as lessee under the Crown,

(1) 2 B. & Ad. 437.
(2) 2 E. & B. 132.
(3) 2 D. F. & J. 415.
(4) 34 L. J. (Ch.) 406.
(5) Law Rep. 2 H. L., Sc. 166.
(6) Ibid. 9 Ch. 221.

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is entitled to the use of the underground road or crut without the interference of the copyholder, who has no ownership in the subsoil: *Lewis* v. *Branthwaite* (1); *Duke of Hamilton* v. *Graham* (2). The case is analogous to that of *Ballacorkish Silver Mining Company* v. *Harrison* (3), where a reservation had been made of minerals in the *Isle of Man* to the Crown, and it was held that the Crown was entitled to the use of all waters percolating by natural process into the mines when opened.

As regards the use of the railway, the Plaintiffs are precluded from raising any objection by the acquiescence of *Ann Adams*, their predecessor in title, who must be taken to have allowed the railway to be constructed over her copyhold land, by granting a lease of her freehold land for the purpose of carrying the *Sneyd* minerals, which she knew could only have been carried from the deep pit over her copyhold land. Such acquiescence disentitles the Plaintiffs to relief: *Dann* v. *Spurrier* (4); *Duke of Beaufort* v. *Patrick* (5); *Master, &c., of Clare Hall* v. *Harding* (6).

JESSEL, M.R.:— Judgment.

This is really an undefended suit; when you come to look at the admissions in the answer, there is no case whatever on the part of the Defendant. [His Lordship then stated the facts.] It is said that because *Ann Adams*, by her lease of the 10th of December, 1852, gave the Defendant the right to carry the coals or minerals from any mines belonging to him or belonging to *Sneyd* (for this purpose it is immaterial)—therefore she gave him a right to carry not only over her freehold, but over the copyhold; and it is said she must have given him the right for this reason, because he afterwards made a communication underground from the pit by means of a crut to *Sneyd's* lands on the other side of the copyhold lands, that is, instead of sinking a pit in the freeholds of *Sneyd*, which adjoined the freehold of *Ann Adams*, he made a communication underground from the deep pit by a crut through the copyhold land, and then carried the coal up the deep pit and thence along the railway.

(1) 2 B. & Ad. 437.
(2) Law Rep. 2 H. L., Sc. 166.
(3) Ibid. 5 P. C. 49.
(4) 7 Ves. 231.
(5) 17 Beav. 60.
(6) 6 Hare, 273.

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But it would appear that at the time *Ann Adams* granted the lease of a part of her freehold land for the purpose of the railway, and gave the Defendant the right to carry coals from any mines which belonged to or were occupied by him—at that period she did not know how he was going to work the mines of *Sneyd*. She expressly granted the right over her freehold lands, but she did not grant any right over her copyhold lands. Acquiescence is out of the question. The Earl had not only a right to make the works, but he did make almost all the works previously, and he had a right to make them without her consent and in spite of her refusal. There is, therefore, no acquiescence. If he claims a right to carry coals from the *Sneyd* mines over her copyhold lands, he must make out some legal title. But he has not a shadow of legal title; and as to acquiescence, there is no equitable title: consequently, as far as that is concerned, he is a mere trespasser, and he being a trespasser comes within the well-established doctrine of *Goodson* v. *Richardson* (1), and *Rochdale Canal Company* v. *King* (2), where damages would be no compensation for a right to property, and the Plaintiffs are entitled to prohibit him by injunction. There may be little or no injury to the estate, but if they restrain him he will be glad to pay a way-leave.

The other part of the case is still more singular when I look at the answer. The crut was made in the way described, and the result was that the coal passing under the copyhold lands of the Plaintiffs, formerly of *Ann Adams*, it was brought from *Sneyd's* land out of the manor, through an opening or tunnel under the copyhold lands belonging to the Plaintiffs, without their consent.

The law upon that subject has been well considered, and it has been settled by authority which is certainly binding upon me. The law seems to stand in this way: The estate of a copyholder in an ordinary copyhold (for it is an estate) is an estate in the soil throughout, except as regards for this purpose timber-trees and minerals. As regards the trees and minerals, the property remains in the lord, but, in the absence of custom, he cannot get either the one or the other, so that the minerals must remain unworked, and the trees must remain uncut. The possession is in the copyholder; the property is in the lord. If a stranger cuts

(1) Law Rep. 9 Ch. 221. (2) 2 Sim. (N.S.) 78.

down the trees, the copyholder can maintain trespass against the stranger, and the lord can maintain trover for the trees. If the lord cuts down the trees, the copyholder can maintain trespass against the lord; but if the copyholder cuts down the trees, irrespective of the question of forfeiture, the lord can bring his action against the copyholder.

So in the case of minerals. If a stranger takes the minerals, the copyholder can bring trespass against the stranger for interfering with his possession, and the lord may bring trover, or whatever the form of action may be now, against the stranger to recover the minerals. The same rule applies to minerals as to trees. If you once cut down the tree, the lord cannot compel the copyholder to plant another. The latter has a right to the soil of the copyhold where the tree stood, including the stratum of air which is now left vacant by reason of the removal of the tree. So, if the lord takes away the minerals, the copyholder becomes entitled to the possession of the space where the minerals formerly were, and he is entitled to use it at his will and pleasure. If you have a shaft made for working the mines, the copyholder may descend in the shaft, and either walk about in the space below, or use it for any other rational purpose. That is the position of the copyholder. That being so, and there being no minerals in this crut, if that is the law, the Earl, as Crown lessee, cannot have a greater right than the Crown, that is, the lord or lady of the manor. He has, therefore, no right now to trespass on the copyhold for any purpose whatever, because I assume he does not want it for the purpose of working the manorial minerals; for that purpose he has a right to use it; but assuming that he does not want it for that purpose, but only wants it for the purpose of carrying the coal from under *Sneyd's* estate—that is, foreign coal—he has no right to use it at all. Of course the injunction to be granted will only restrain him from using it for that purpose; it will not affect the other right. It is not trespass while he carries Crown minerals. It is trespass when he uses it for any other purpose.

I take it that the law is clearly settled, and I am surprised to hear it disputed. In the first place, the law is laid down, perhaps not as accurately as might be wished as regards the words used,

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by Lord *Campbell* in *Bowser* v. *Maclean* (1): "I am inclined to think that a mistake has been committed in not distinguishing between a copyhold tenement with minerals under it, and freehold land leased with a reservation of the minerals"—he should have said "of the mines," but he has used the words "reservation of the minerals," meaning an exception of the mines—"or freehold land where the surface belongs to one owner and the subsoil, containing minerals, belongs to another, as separate tenements divided from each other vertically, instead of laterally." That is quite intelligible; what he means is this—he does not say it, but he means it—If a freeholder grants lands excepting mines he severs his estate vertically, *i.e.*, he grants out his estate in parallel horizontal layers, and the grantee only gets the parallel layer granted to him, and does not get any underlying mineral layer or stratum. That underlying stratum remains in the grantor. The freeholder retains the mineral stratum as part of his ownership; and whether or not he takes the minerals or subsoil out of the stratum, the stratum still belongs to him as part of the vertical section of the land. But he says in the case of a copyholder, that is not so, because the copyholder, though he has no property in the stratum in the sense of being entitled to take the minerals, has property and possession in this sense, that the moment the minerals are taken away the space is in his possession, and he only can interfere with it, the lord having no right to do so.

The same proposition was laid down in the case of *Lewis* v. *Branthwaite* (2), where Lord *Tenterden* expressly puts it that there is no distinction between trees and minerals as regards the law of copyholds, and so in the case before Lord *Campbell* of *Keyse* v. *Powell* (3).

Then it has been suggested that the recent case of *Duke of Hamilton* v. *Graham* (4) has somehow or other altered the law; but it has not. That was a Scotch case, and it was treated as being the same as a grant by an English freeholder. It exactly concurs, therefore, in its reasoning with the decision of Vice-

(1) 2 D. F. & J. 420.
(2) 2 B. & Ad. 437.
(3) 2 E. & B. 132.
(4) Law Rep. 2 H. L., Sc. 166.

Chancellor *Wood* in the case of *Proud* v. *Bates* (1) and the decision of Lord *Campbell* in *Bowser* v. *Maclean* (2), that where a freeholder grants lands excepting the mines, he intends, first of all, as a matter of construction, to except not merely minerals, but the portion of the subsoil containing the minerals; in other words, to retain a stratum of the property. And if he does that, of course the lessee or grantee has no title whatever to the portion of the stratum reserved. That is all that the case of *Duke of Hamilton* v. *Graham* (3) decided. It decided that the same law applies to *Scotland* which applies to *England*. In a case like that the word "mines" meant subsoil containing the minerals, and not merely the minerals themselves.

The only other case that was referred to was the case in the Privy Council from the *Isle of Man* of *Ballacorkish Silver Mining Company* v. *Harrison* (4). It was a case decided upon exactly the same principle. In that case it was not merely a lord of the manor depending upon his ordinary title as lord of the manor, but also upon the Act of *Tynwald*, which was an Act of Parliament of the *Isle of Man*, by which the mines were reserved to him; and Lord *Penzance*, who gave the judgment, said this (5): "The Act affirms that he has excepted out of the grant not only the minerals, but that portion of the soil which contains the minerals, and which constitutes the 'mine.'" Consequently they had only to decide this: that on their own interpretation of the Act the mine, meaning the portion of the subsoil containing the minerals, being excepted, remained in the lord of the manor, and the copyholder had nothing whatever to do with it. That was, therefore, entirely distinguishable from the ordinary case of an English copyholder who had the possession of the minerals. So far from interfering with the law as laid down in other cases, that case confirms it, because the Privy Council would not have had recourse to the Act of Parliament if the law had given it to the lord of the manor as part of the customary law applicable to copyholders, and he would have been entitled to it entirely irrespective of the legislative provisions upon which he relied.

(1) 34 L. J. (Ch.) 406.
(2) 2 D. F. & J. 415.
(3) Law Rep. 2 H. L., Sc. 166.
(4) Ibid. 5 P. C. 49.
(5) Law Rep. 5 P. C. 62.

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That being so, it appears to me perfectly clear on this part of the case also, that the Plaintiffs are entitled to the injunction which they seek. The Plaintiffs will have the costs of the suit.

Solicitors for Plaintiffs: *Wedlake & Letts*, agents for *Keary & Marshall, Stoke-upon-Trent.*

Solicitors for Defendant: *Worthington Evans & Cook*, agents for *Hand, Blakiston, & Everett, Stafford.*

END OF VOL. III.

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ADVOWSON—*Right of Presentation vested in Parishioners—Mode of Exercising the Right—Law of Public Meetings—Vote by Ballot.*] The advowson of a parish church being vested in trustees who were bound to present the nominee of the parishioners and inhabitants, a vacancy occurred, and at a meeting of parishioners convened by the churchwardens, and presided over by one of them, the 30th of August was fixed upon for a meeting "to proceed to the election of a vicar." Meanwhile, upon the requisition of certain inhabitants, a meeting of the 25th of August, summoned by the churchwardens, but at which they declined to preside, was held, at which resolutions were passed to the effect that the election should be by ballot, on one day only, and at several polling places, and that the poll should be open from 9 to 9. On the 30th of August the meeting resolved upon was held, candidates were nominated, a show of hands taken, and a poll demanded, and one of the churchwardens, who was in the chair, announced that the poll would be taken by open voting, on the following and two successive days, at one polling place only, and that the poll would be kept open from 8 to 8. Upon a parishioner rising to move amendments similar to those of the 25th of August, the chairman left the chair, and declared the meeting at an end. After the churchwarden had left the chair, another chairman was chosen, and a series of resolutions, similar to those of the 25th of August, were moved and carried.—The poll having been taken in the way announced by the chairman of the meeting of the 30th of August:—*Held*, that the conduct of the churchwardens had been erroneous and illegal; but, there being no evidence of any voter having been deprived of an opportunity of voting, that the election could not be disturbed.—*Semble*, an election by ballot, if duly resolved upon, is not at the present day an illegal mode of election.—Observations on *Faulkner* v. *Elger* (4 B. & C. 449) and *Edenborough* v. *Archbishop of Canterbury* (2 Russ. 93).—The duties of churchwardens in conducting parish meetings considered. Shaw *v.* Thompson - - 233

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ADVOWSON—*continued.*
of the £12,000 or the accumulations remained after completing such contract, the same was to be paid to the son, his executors or administrators.—The £12,000 having been set apart and invested and accumulated, but no advowson having been bought, the son, thirteen years after the testator's death, claimed the entire fund:—*Held*, that although there was no person who could enforce the trust, yet, as the trustees were willing to carry it out, and could present any fit person they chose to the benefice when they had bought the advowson, the son was not the exclusive object of the trust, and was not entitled to a transfer of the fund. Gott *v.* Nairne - - - - - 278
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AMALGAMATION OF COMPANIES—*continued.*

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2. —— *Contributory — Transfer of Shares — Trustee—Subsequent Inrolment—Separate Shareholder.*] With a view to the transfer of the business of the *A.* insurance company to the *B.* insurance company, the greater number of the shareholders in the *A.* company agreed to assign their shares to trustees for the *B.* company. In the case of one of these shareholders, he assigned his shares to a trustee for the *B.* company, receiving the consideration money out of the assets of the *A.* company, though there was no evidence that this was known to him. By a private Act of Parliament, transfers of shares in the *A.* company were to be inrolled in Chancery, but the transfer of these shares was not inrolled until four years after the transfer, when the *A.* company ceased to carry on business. Eight years afterwards an order was made for winding up the *A.* company, which had large liabilities, but no assets except such as could be obtained by calling up the shares, and it was held in the winding-up that the claims of the policy-holders in the *A.* company continued in force against that company:—*Held*, that the case of this shareholder was to be considered by itself, and without reference to the effect which the decision might have upon the general winding-up:—*Held*, that there was nothing unlawful, and no breach of trust in the arrangement between the two companies so as to make the transfer of the shares invalid:—*Held*, that the subsequent inrolment of the transfer was sufficient:—*Held*, that this shareholder was not a contributory in the winding-up of the *A.* company. *In re* EUROPEAN ASSURANCE SOCIETY. RIVINGTON'S CASE 10

3. —— *Contributory—Transfer—Inrolment of Transfer—New Laws—Ultrà Vires.*] By the deed of settlement of the *A.* insurance company power was given to the directors to call an extraordinary meeting of the company for the purpose of making new laws and regulations. By laws and regulations made accordingly several years afterwards, power was given to the directors to make a junction with any other company. By a private Act of Parliament, shareholders who had executed transfers were to continue liable until their transfers were inrolled in Chancery, but were to be reimbursed out of the funds of the company for all losses sustained in consequence thereof, nor were they to be liable for any debt for which they would not have been liable as partners, nor could anything be recovered from them which could not have been recovered if the Act had not been passed.—With a view to an amalgamation with the *B.* insurance company, the greater number of shareholders in the *A.* company agreed to transfer their shares to trustees for the *B.* company. In the case of one of these shareholders he assigned his shares to a trustee for the *B.* company, but the transfer was not inrolled in Chancery. The *A.* company then ceased to carry on business. Thirteen years afterwards the *A.* company was ordered to be wound up. There were claims by policy-holders whose policies were granted before

AMALGAMATION OF COMPANIES—*continued.*

the alteration in the laws and regulations:—*Held*, that, though the transfer was not inrolled, it would be useless to make the shareholder a contributory, as he would under the Act receive back from the company all that he paid to it; also, that as his transfer was valid according to the constitution of the company, the Act prevented him from being liable to pay the debts of the company:—*Held*, also, that as the deed of settlement to which the policy-holders were subject provided for making new laws and regulations, they were bound by these new laws and regulations when made; and therefore,—*Semble*, that the amalgamation between the companies was not *ultrà vires*. *In re* EUROPEAN ASSURANCE SOCIETY. DOMAN'S CASE 21

4. —— *Insurance Company — Dissolution — Transfer of Liabilities—Notice of Contents of Deed of Settlement.*] By the deed of settlement of the *R. N. Society*, it was provided that the funds and property of the society should alone be answerable for claims on the society, and there were provisions enabling the society to make over its business to another company. The society granted an annuity to *D.* by a deed executed by three directors, which declared that the stocks and funds of the society should during the life of *D.* be liable to pay the annuity. Some years after this the *R. N. Society* made over its business to the *E. Society* in manner authorized by the deed of settlement. Both societies being under winding-up, *D.* claimed against the *R. N. Society*:—*Held*, that the omission in the annuity deed of any express reference to the deed of settlement did not distinguish the case from *Hort's Case* (1 Ch. D. 307), and that *D.* could only claim against the *E. Society*. *In re* EUROPEAN ASSURANCE SOCIETY. DOWSE'S CASE - - - - - - - 384

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APPEAL—*Practice—Setting down Appeal—Production of Order—Refusal of Interlocutory Motion—Rules of Court*, 1875, *Order* LVIII., *rr.* 8, 15.] An appeal from the refusal of an interlocutory motion may be set down without production of the order appealed from, or a copy of it.—Order LVIII., rule 8, does not apply to such a case. Smith *v.* Grindley. Smith *v.* Charrington - 80

2. —— *Practice—Time for Appealing—Refusal of Interlocutory Motion—Order as to Costs—Rules of Court*, 1875, *Order* LVIII., *r.* 15.] When an interlocutory motion is refused, and the Court at the same time makes an order as to the costs of the motion, this addition does not enlarge the time for appealing, which still begins to run from the time of the refusal of the order, and not from the time of its being perfected by entry. Swindell *v.* Birmingham Syndicate - - 127

—— Striking out pleadings - - 380
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—— New trustees—Trustee Act - - 112
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APPROPRIATION OF CONSIGNMENTS—*Bills of Exchange drawn against Goods—Specific Appropriation of Proceeds of Sale—Vendor and Purchaser—Bankruptcy of Purchaser.*] Bills of exchange were drawn by the vendor and shipper of goods upon the purchaser for the invoice prices of the goods, with a direction to place the same to account of the shipments. On the acceptance of the bills by the purchaser the bills of lading were handed over to him. The bills of exchange were dishonoured at maturity, and the purchaser became bankrupt:—*Held*, that there was no specific appropriation of the proceeds of sale of the goods to meet the bills of exchange.—*Frith* v. *Forbes* (4 D. F. & J. 409) explained. *In re* Entwistle. *Ex parte* Arbuthnot - - - - 477

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BALLOT—Election by—Parish church - 233
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BANKER—Lien—Shares standing in name of one partner - - - - 481
See Creditor holding Security. 1.

BANKRUPT SHAREHOLDER — *Company — Insolvency of Shareholder—Winding-up—Order of Discharge under Indian Act—Liability of Shareholder not a Proveable Debt — Contributory.*] Shares in an English company were taken by a resident at *Bombay*, who became insolvent. Afterwards the company was ordered to be wound up. The debtor subsequently obtained an order of discharge under an Indian Act:—*Held*, that the liability of the insolvent in respect of the shares was not a debt proveable in the insolvency proceedings; hence that it was not barred by the order of discharge; and the name of the late insolvent was ordered to be placed on the list of contributories. *In re* East India Cotton Agency. Furdoonjee's Case [264

BANKRUPTCY—Composition—Resolution 435
See Resolution for Liquidation. 2.
—— Costs—Concurrent liquidation—Bankruptcy
See Costs of Liquidation. [320
—— Debtor's summons - - - 498
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See Disclaimer. 1, 2.
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See Examination of Liquidating Debtor.
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—— Liquidation—Resolution - 119, 435
See Resolution for Liquidation. 1, 2.
—— Liquidation—Undischarged debtor - 123
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—— Mortgagor—Solicitor's lien on deeds - 317
See Solicitor's Lien.
—— Order and disposition - - - 795
See Order and Disposition.
—— Petition for adjudication - 322, 452, 461
See Bankruptcy Petition. 1, 2, 3.
—— Proof—Allowance of discount - 803
See Discount. 2.
—— Proof—Creditor holding security 481, 488
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—— Proof—Damages for disclaimer by trustee
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—— Proof—Damages in action of tort - 494
See Proof for Damages.
—— Protected dealing with bankrupt - 70
See Protected Dealing with Bankrupt.
—— Scheme of arrangement - - 445
See Scheme of Arrangement.
—— Trader - - - - - - 457
See Trader.
—— Voluntary settlement by bankrupt - 807
See Fraudulent Conveyance.

BANKRUPTCY JURISDICTION — *Liquidation — Release of Trustee by Creditors—Non-payment of Dividend to Creditor—Jurisdiction of Court of Bankruptcy—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 46, 125.] The trustee of a liquidating debtor sold the whole estate for a sum equal to 7*s.* 6*d.* in the pound upon the amount of the proveable debts, to be paid in three instalments, on the 23rd of April, the 23rd of June, and the

BANKRUPTCY JURISDICTION—*continued.*
23rd of August. On the 23rd of April the creditors resolved that the debtor should have his discharge as from the 30th of April, subject to a certificate by the trustee that the first instalment of the purchase-money had been paid, and that promissory notes for the other instalments had been delivered to him, and that the close of the liquidation should take place, and the trustee be released on and from the 23rd of October:—*Held* (reversing the decision of the County Court Judge), that, notwithstanding the release of the trustee, the Court had jurisdiction to order him to pay a dividend to a creditor. *In re* PRAGER. *Ex parte* SOCIÉTÉ COCKRILL - 115

2. —— *Liquidation—Dispute between Trustee and Third Party—Reference to Arbitration by Consent—Witness refusing to attend before Arbitrator—Power of Court to issue Subpœna*—3 & 4 *Will.* 4, *c.* 42, *s.* 40—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 66—*Bankruptcy Rules*, 1870, *r.* 166—9 & 10 *Vict. c.* 95, *ss.* 77, 85.] A matter in dispute between a trustee in a liquidation and a third party was, by an order made by consent, referred to arbitration. A witness refused to attend before the arbitrator:—*Held* (reversing the decision of the County Court Judge), that the Court could issue a subpœna, under rule 166 of the Bankruptcy Rules, 1870, for the attendance of the witness before the arbitrator. *In re* ACKARY. *Ex parte* BOLLAND - - 125

BANKRUPTCY PETITION—*Omission of Debtor to give Notice of Intention to oppose—Adjudication—Costs—Bankruptcy Rules*, 1870, *rr.* 36, 37, 38.] A debtor against whom a bankruptcy petition had been presented instructed his solicitor to oppose it. The solicitor inadvertently omitted to give the notice required by rule 36 of the Bankruptcy Rules, 1870, but he appeared at the hearing of the petition, and asked to be allowed to dispute the validity of the petitioning creditor's debt. The Registrar refused to permit this, and made an adjudication:—*Held*, that the debtor ought to have been allowed to adduce his evidence, and that the adjudication must be annulled, but that the debtor must pay the costs occasioned by the omission to give the notice. *In re* DALE. *Ex parte* DALE - - - - 322

2. —— *Evidence in Support — Bankruptcy Rules*, 1870, *rr.* 36, 37, 38.] A creditor filed a petition for adjudication, with the usual affidavit verifying the statements of the petition. The debtor gave notice of his intention to dispute the statements in the petition, and attended at the hearing but did not tender any evidence. The Registrar accordingly made an order of adjudication without further evidence on behalf of the creditor than the affidavit filed with the petition:—*Held* (affirming the decision of *Bacon*, C.J.), that the statements in the petition ought to have been proved afresh; and that the adjudication must be annulled. *Ex parte* DODD. *In re* ORMSTON - - - - - 452

3. —— *Use for inequitable Purpose—Power of Court to refuse to adjudicate.*] When the Court sees that a bankruptcy petition has been made use of for an inequitable purpose, as, for instance, to extort money from the debtor, it will refuse to make an adjudication, even though there is a good petitioning creditor's debt, and an act of bankruptcy has been committed. *In re* DAVIES. *Ex parte* KING - - - - 461

BANKRUPTCY RULES, 1870, r. 14 - 113
See INJUNCTION IN BANKRUPTCY.

—— **rr. 21, 61** - - - - 498
See DEBTOR'S SUMMONS.

—— **rr. 31, 186** - - - - 320
See COSTS OF LIQUIDATION.

—— **rr. 36, 37, 38** - - - 322, 452
See BANKRUPTCY PETITION. 1, 2.

—— **rr. 99, 100** - - - - 481
See CREDITOR HOLDING SECURITY. 1.

—— **r. 143** - - - - - 459
See DISCLAIMER. 1.

—— **r. 166** - - - - - 125
See BANKRUPTCY JURISDICTION. 1.

—— **rr. 171, 301** - - - - 315
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—— **r. 179** - - - - - 810
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—— **r. 289** - - - - - 119
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—— **1871, r. 28** - - - - 459
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BILL OF EXCHANGE—Appropriation of consignments to meet - - - 477
See APPROPRIATION OF CONSIGNMENTS.

BILL OF SALE—Registration - - 324
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BONDS — Corporation — Application of compensation under Lands Clauses Act - 289
See REINVESTMENT OF PURCHASE-MONEY. 2.

BORROWING POWERS — *Debentures—Issue at Discount—Security—Pari passu.*] The directors of a company were empowered to issue 100 mortgage debentures at £95 for £100. Sixty of these debentures were duly taken up; the other forty were afterwards mortgaged by the directors by way of collateral security for an advance of money. The company was afterwards wound up:—*Held* (affirming the decision of *Malins*, V.C.), that the mortgage was not *ultrà vires*, and that the mortgagees would receive dividends on the whole amount expressed to be secured by their debentures, *pari passu* with the holders of the other sixty debentures. *In re* REGENT'S CANAL IRONWORKS COMPANY - - - - 43

BUILDING—Compensation under Lands Clauses Act - - - - - 262
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—— Mansion-house—Personalty on same trusts as land - - - - 743
See ACCUMULATIONS.

CALLS—Liability of testator's trustees - 752
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CAPITAL AND INCOME—Calls on shares - 752
See LIABILITY FOR CALLS.

CASES—*Bingham* v. *Bingham* (1 Ves. Sen. 126)
See CONDITIONS OF SALE. [779

CASES—*continued.*

—— *In re Butler's Will* (Law Rep. 16 Eq. 479) followed - - - - 61
See Payment out of Court.

—— *Collins* v. *Lewis* (Law Rep. 8 Eq. 708) followed - - - - 109
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—— *Connell, Ex parte* (3 Dea. 201; 3 Mont. & A. 581) followed - - - 481
See Creditor holding Security. 1.

—— *Davis* v. *Morier* (2 Coll. 303) distinguished [351
See Mistake in Law.

—— *Dugdale* v. *Dugdale* (Law Rep. 14 Eq. 234) followed - - - - 109
See Marshalling.

—— *Festing* v. *Allen* (12 M. & W. 279; 5 Hare, 573) disapproved - - - 703
See Acceleration of Remainder.

—— *Frith* v. *Forbes* (4 D. F. & J. 409) explained [477
See Appropriation of Consignments.

—— *Garling* v. *Royds* (1 Ch. D. 81) not followed [190
See Contempt, Process of.

—— *Hensman* v. *Fryer* (Law Rep. 3 Ch. 420) not followed - - - - 109
See Marshalling.

—— *Hort's Case* (1 Ch. D. 307) followed 1, 384
See Amalgamation of Companies. 1, 4.

—— *Jones, Ex parte* (Law Rep. 10 Ch. 663) considered - - - 113, 488
See Execution Creditor. 1, 2.

—— *London Marine Insurance Association, In re* (Law Rep. 8 Eq. 176) commented on [522
See Mutual Insurance Society.

—— *Marsden, In re* (4 Drew. 594) distinguished [429
See Fraudulent Appointment.

—— *Moseley's Trusts, In re* (Law Rep. 11 Eq. 499) disapproved of - - 643
See Remoteness of Limitation. 3.

—— *Osborn's Mortgage Trusts, In re* (Law Rep. 12 Eq. 392) distinguished - - 209
See Trustee Acts. 2.

—— *Pigou, Ex parte* (3 Madd. 136) not followed [803
See Discount. 2.

—— *Rowsell* v. *Morris* (Law Rep. 17 Eq. 20) commented upon - - - 198
See Executor de son Tort.

—— *Scott* v. *Royal Wax Candle Company* (1 Q. B. 404) followed - - - 275
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—— *Sheppard's* Touchstone (p. 292) questioned [618
See Partition.

—— *Sidney* v. *Wilmer* (4 D. J. & S. 84) not followed - - - - 374
See Executory Limitation.

—— *Spencer's Case* (5 Rep. 16a.; 1 Sm. L. C. 60) [694
See Covenant running with Land.

—— *Tardiff* v. *Robinson* (27 Beav. 629, n.) distinguished - - - - 327
See Enjoyment in Specie.

—— *Tomkins* v. *Colthurst* (1 Ch. D. 626) followed [109
See Marshalling.

CASES—*continued.*

—— *Topham* v. *Duke of Portland* (Law Rep. 5 Ch. 40) distinguished - - 429
See Fraudulent Appointment.

—— *Trotman* v. *Wood* (16 C. B. (N.S.) observed upon - - - - - 134
See Patent. 1.

—— *Verner, In re* (15 Sol. J. 697) overruled 113
See Injunction in Bankruptcy.

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See Joinder of Causes of Action.

CHARGE OF LEGACIES—*Will—Construction—Real Estate—Direction for Payment of Debts and Legacies by Executors—Gift of Legacies followed by Gift of Residue of Real and Personal Estate in one Mass.*] The rule that legacies followed by a gift of real and personal residue in one mass are charged on the real estate applies although preceded by a direction that the debts and legacies shall be paid by the executors.—A testatrix by her will directed her debts and funeral and testamentary expenses, and the legacies thereby bequeathed, to be paid by her executors thereinafter named, and after bequeathing specific and pecuniary legacies and making a specific devise, she gave the residue of her real and personal estate to *A.* and *B.* upon certain trusts, and appointed *A.* and *C.* executors:—*Held*, that the legacies were charged on the residuary real estate of the testatrix. *In re* Brooke. Brooke *v.* Rooke 630

CHARGING ORDER—*Practice—Costs not yet taxed—Rules of Court*, 1875, *Order* xlvi., *r.* 1.] Where a Plaintiff's bill had been dismissed with costs, an order *nisi* charging railway shares belonging to the Plaintiff with the amount of the Defendant's costs when taxed was made before taxation upon the application of the Defendant. Burns *v.* Irving - - - - 291

CHARITABLE GIFT—*Will—Fund to be distributed at the Discretion of Executors.*] A testator directed that a fund of personalty over which he had a general power of appointment should, unless otherwise specifically disposed of by a codicil, become part of his residuary estate. By a codicil he gave out of this fund various charitable legacies, and directed that the residue of the fund should be given by his executors to the charitable institutions to which he should by any future codicil give the same, "and in default of any such gift, then to be distributed by my executors at their discretion." He made no subsequent codicil:—*Held* (affirming the decision of *Hall*, V.C.), that the ultimate trust in the codicil was that the residue should be distributed by the executors among charitable institutions at their discretion, and that a trust in favour of charity was created. Pocock *v.* Attorney-General 342

CHILD EN VENTRE SA MÈRE—*Will—Gift to three Children of Niece—A fourth Child en Ventre sa Mère at Date of Will.*] Testatrix, who died in November, 1874, by her will in January, 1874, bequeathed to each of the three children of her neice £1000; and if any of the said three children should die before attaining the age of twenty-one years, the legacy was to be divided between the survivors of the said three children. There was a codicil in June, 1874, confirming, as regarded this bequest, the will. At the date of the will

CHILD EN VENTRE SA MÈRE—*continued.*
the niece had three children living, the youngest being three years old, and a fourth child *en ventre sa mère* at the time, and born in July, 1874, claimed a legacy of £1000:—*Held*, that the three children born at the date of the will only were entitled to legacies. *In re* EMERY'S ESTATE. JONES *v.* EMERY - - - - 300
—— Illegitimate child - - - - 773
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CHILDREN—Death before share payable - 654
See DEATH BEFORE SHARE PAYABLE.
—— Illegitimate - - - - - 773
See ILLEGITIMATE CHILDREN.
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CHURCH—Right of presentation - 233, 278
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—— Severance of—Gift to children and grandchildren who attain twenty-four - 643
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COMPANY—Amalgamation 1, 10, 21, 384, 391
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—— Bankruptcy of shareholder - - 264
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—— Borrowing powers—Mortgage debentures 43
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—— Director—Qualification - - 661
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—— Misrepresentation in prospectus - 722
See MISREPRESENTATION IN PROSPECTUS.
—— Mortgage—Registration - - - 669
See UNREGISTERED MORTGAGE.
—— Mutual insurance society - - 522
See MUTUAL INSURANCE SOCIETY.
—— Novation—Insurance company 1, 384, 391
See AMALGAMATION OF COMPANIES. 1, 4, 5.
—— Past member - - - - 388
See PAST MEMBER.
—— Winding-up—Staying proceedings 594, 749
See STAYING PROCEEDINGS. 1, 2.
COMPENSATION UNDER LANDS CLAUSES ACT—*Mortgagor and Mortgagee—Compensation for Loss of Profits—Goodwill.*] The owner of business premises mortgaged them with the machinery and fixtures. A railway company gave notice to take part of the premises for their railway, but before the price was fixed the mortgagor died, and the mortgagees entered into possession of the property. A suit was instituted for the administration of the mortgagor's estate, which proved to be insolvent, and a receiver was appointed, who, with the consent of the mortgagees, carried on the business. Arbitrators and an umpire were appointed
COMPENSATION UNDER LANDS CLAUSES ACT—*continued.*
to fix the compensation money payable by the company. The umpire awarded a sum of £15,950, of which he certified that he had awarded £2800 in respect of the loss of profits in carrying on the business. The executors claimed the £2800 as belonging to the mortgagor's estate, to be divided among his general creditors:—*Held* (affirming the decision of *Hall*, V.C.), that the £2800 was in the nature of compensation for the value of the goodwill of the business, which passed with the premises: and that the whole of the sum of £11,950 belonged to the mortgagees. PILE *v.* PILE. *Ex parte* LAMBTON - - - - - 36
COMPOSITION WITH CREDITORS—Execution creditor - - - - 113, 488
See EXECUTION CREDITOR. 1, 2.
—— Proof—Admission of amount of debt 803
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—— Resolution, form of - - - 119
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COMPULSORY REGISTRATION—Company 388
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CONDITION—Void—Annexed to valid appointment - - - - 429
See FRAUDULENT APPOINTMENT.
CONDITIONS OF SALE—*Vendor and Purchaser—Contract for Sale—Condition precluding Inquiry as to Title—Discovery aliunde—Common Mistake—Specific Performance.*] The Defendant contracted to buy from the Plaintiff freeholds and leaseholds under the condition that he should assume that *E. M.*, who died in 1871, was seised in fee of the freeholds, and should not "require the production of or investigate or make any objection in respect of the prior title" thereto.—He accepted the title, and before completion contracted to sell the lands, with a farm of his own adjoining the freeholds, to a sub-purchaser, who discovered, from an inclosure award prior in date to 1841 (as to the effect of which both the Plaintiff and Defendant had been under a misapprehension), that the freeholds had never belonged to *E. M.*, but at the date of the contract belonged to the Defendant himself in fee, subject to a leasehold interest in the Plaintiff.—The Defendant then refused to complete, and the Plaintiff filed her bill for specific performance, stating that she too had discovered that part of the lands she had contracted to sell as leaseholds belonged to her in fee simple, and offering mutual waiver or compensation:—*Held*, that the Defendant was not precluded by the condition or the acceptance of title from taking the objection, and that the Court could not decree specific performance; but that, although there was no fraud, yet, there being a common mistake, the Defendant was entitled to an inquiry as to the title to the freeholds at the date of the contract.—Observations upon the authorities as to conditions restricting investigation of title, and upon *Bingham* v. *Bingham* (1 Ves. Sen. 126).—*Semble*, the Court will, even in the case of a completed contract, give relief against a common mistake without fraud. JONES *v.* CLIFFORD - - - 779

CONSENT—Order by—Withdrawal of - 177
See ORDER BY CONSENT.

—— Settled Estates Act - - 145, 690
See SETTLED ESTATES ACTS. 1, 2.

CONSIGNMENTS OF GOODS—Bill of exchange drawn against - - - 477
See APPROPRIATION OF CONSIGNMENTS.

CONTEMPT OF COURT—*Application to commit—Power of Court to abridge Length of Notice—Bankruptcy Rules*, 1870, *r.* 179.] The Court has no power under rule 179 of the Bankruptcy Rules, 1870, to abridge the three days' notice which is to be given of the hearing of an application to commit for contempt of Court. *In re* BRYANT 810

CONTEMPT, PROCESS OF—*Attachment—Suit not brought to a Hearing—Notice—Rules of Court*, 1875, *Order* XLIV., *r.* 2.] The new practice by which writs of attachment are only to be issued after notice to the party sought to be attached applies to all orders made subsequent to the *Judicature Act* coming into force, and applies whether the suits in which the orders have been made are being carried on under the old or the new practice.—*Garling* v. *Royds* (1 Ch. D. 81) not followed. DALLAS *v.* GLYN - - 190

CONTINGENT REMAINDER—*Will—Estate of Trustees.*] A testator devised a moiety of his real estate to *A.* and *B.* and their heirs, to the uses and upon and for the trusts and purposes thereinafter mentioned, namely, to the use of *A.* and *B.*, their executors, administrators, and assigns, for 120 years, if *S. C.*, the wife of *J. C.*, should so long live, and subject thereto, to the use of *J. C.* for life, with remainder to *A.* and *B.* and their heirs during his life, upon trust to preserve contingent remainders, with remainder to the use of all the children of *J. C.* and *S. C.* who should be living at the decease of the survivor of them, and the issue then living of such of the children as should be then dead, and the respective heirs and assigns of such children and issue as tenants in common (the issue taking only their parent's share), with divers remainders over. The will contained a power authorizing *A.* and *B.* and the survivor of them, and the heirs and assigns of such survivor, to "convey in exchange" any parts of the property, and to "convey upon partition" any of testator's undivided shares, with a direction that for those purposes it should be lawful for them by deed to revoke the uses, estates, trusts, and limitations of the property in shares so exchanged or conveyed in partition, and by the same or any other deed to "grant and convey" them to the requisite uses, "or for the purposes aforesaid to limit, appoint, or declare such use or uses," &c., as should be necessary. *J. C.* died in the lifetime of *S. C.*:—*Held* (affirming the decision of the Master of the Rolls), that the intention of the testator clearly was to create a succession of legal limitations in settlement, and that the Court could not hold the legal fee to be in *A.* and *B.* merely because if it was not in them the contingent remainder to the children had in the events which had happened failed for want of an estate of freehold to support it. CUNLIFFE *v.* BRANCKER 393

CONTINGENT REVERSIONARY INTEREST 767
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CONTRACT—Bankrupt—Disclaimer by trustee
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—— Promoters of company—Omission of contract in prospectus - - - 722
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—— Past member - - - - 388
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CONVEYANCE BY MARRIED WOMAN—*Fines and Recoveries Act* (3 & 4 *Will.* 4, *c.* 74), *ss.* 81, 82—*Acknowledgment by Married Woman—Perpetual Commissioners—Commissioners for Different Counties.*] Commissioners who take the acknowledgment in *England* of a married woman under the *Fines and Recoveries Act* need not be appointed for the county in which the acknowledgment is taken. BLACKMUR *v.* BLACKMUR - - 633

2. —— *Real Estate—Deed acknowledged—Dispensing with Concurrence of Husband—Fines and Recoveries Act* (3 & 4 *Will.* 4, *c.* 74), *s.* 91.] Where a married woman has, under sect. 91 of the *Fines and Recoveries Act*, obtained an order of the Court of Common Pleas dispensing with her husband's concurrence, she may dispose of her real estate by a deed which is not acknowledged by her. GOODCHILD *v.* DOUGAL - - - - 650

COPYHOLDS—Minerals—Right of lord—Possession of soil - - - - 826
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CORPORATION—Bonds—Application of compensation money under Lands Clauses Act - - - - - 289
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COSTS—Bankruptcy petition—Opposition to—Notice - - - - 322
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—— Discontinuance of action - - 276
See DISCONTINUANCE OF ACTION.

—— Lien for - - - - - 317
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—— Liquidation — Concurrent — Bankruptcy petition - - - - 320
See COSTS OF LIQUIDATION.

—— Security for - - - - 62
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—— Testamentary suit - - - 218
See COSTS IN TESTAMENTARY SUIT.

—— Untaxed—Charging order - - 291
See CHARGING ORDER.

COSTS IN TESTAMENTARY SUIT—*Administration—Probate Litigation.*] A grant of probate to *A.*, who alleged that he was the executor devisee and legatee named in the will of *C.*, his father, was revoked by the Judge of the Probate Court, on the ground that testator's son *B.*, and not *A.*, was the person intended to have been named in the will, and probate was granted to *B.*—On appeal to the House of Lords, their Lordships being equally divided, the question whether the

COSTS IN TESTAMENTARY SUIT—*continued.*
decree of the Probate Court should be reversed was, according to the rule "*Semper præsumitur pro negante*," answered in the negative, "and the costs of both parties, as well in the Court below as in this House, were ordered to be paid out of the estate;" and with this direction the cause was remitted to the Court of Probate.—The personal estate being insufficient, a bill was filed by *A.* for administration of the testator's real and personal estate in order to obtain payment of his costs in the probate litigation, and of a debt alleged to be due to him in respect of his acts as an executor before revocation of the grant of probate. The bill also claimed title as devisee and legatee, but this was abandoned at the bar:—*Held*, that the direction of the House of Lords, being based upon and not in this respect exceeding the jurisdiction of the Probate Court which was limited to personal estate, did not operate to make the Plaintiff's costs of the probate litigation payable out of the real estate; and accordingly that the administration must be limited to the testator's personal estate. CHARTER *v.* CHARTER [218

COSTS OF LIQUIDATION — *Concurrent Bankruptcy and Liquidation Petitions — Liquidation resolved upon—Costs of Petitioning Creditor—Bankruptcy Rules*, 1870, *rr.* 31, 186.] A bankruptcy petition was presented against a debtor. Before the hearing he filed a liquidation petition. The hearing of the bankruptcy petition was several times adjourned, to await the result of the proceedings under the liquidation petition. Ultimately a liquidation was resolved upon, and the bankruptcy petition was then dismissed:—*Held*, that the petitioning creditor was entitled to be paid in priority, out of the estate, the cost of his petition, including therein the costs of and incident to a debtor's summons on which the petition was founded, and the costs of the adjournments of the hearing. *In re* BUNNETT. *Ex parte* JEAVONS. [320

COUNTER-CLAIM—*Practice—Judicature Acts—Reply—Joinder of Issue generally—Motion for Account—Striking out or amending Reply—Rules of Court*, 1875, *Order XXXIII.; XL., rr.* 10, 11; *XIX., rr.* 10, 17, 20; *XXII., r.* 10; *XXVII., r.* 1; *LIX.*] A reply joining issue generally will not, upon the application of the Defendant, be ordered to be struck out or amended either under Order XXVII., rule 1, or Order LIX., because it does not deal specifically with the allegations of a counter-claim.—The "balance in favour of the Defendant" mentioned in Order XXII., rule 10, in case a set-off or counter-claim is established against the claim, is the balance upon the hearing of the action.—In an action for an account of rents and profits, the Defendant delivered a defence and a counter-claim to set off money due to him from the Plaintiff under an award. The Plaintiff in his reply simply joined issue generally, and the Defendant then, treating the counter-claim as admitted, moved under Order XXXIII. and Order XL., rules 10 and 11, for an account of what was due to him under it, or in the alternative that the reply might be struck out or amended under Order XXVII., rule 1, as tending to embarrass, and as being a non-compliance with the Rules of

COUNTER-CLAIM—*continued.*
Court within Order LIX.:—*Held*, that the case was not one for an account under Order XXXIII.; that no order could be made on the counter-claim before the principal claim of the Plaintiff was dealt with; and the alternative order refused on the ground that a Defendant could not dictate to a Plaintiff the nature of his pleadings. ROLFE *v.* MACLAREN - - - - - 106

COUNTRY AGENT—Solicitor—Service of debtor's summons - - - - 498
See DEBTOR'S SUMMONS.

COVENANT—Exclusive right of sale - 228
See RESTRAINT OF TRADE.

—— Running with land - - - 694
See COVENANT RUNNING WITH LAND.

—— Satisfaction by legacy - - 587, 590, n.
See SATISFACTION. 2, 3.

—— To settle after-acquired property - 767
See COVENANT TO SETTLE.

COVENANT RUNNING WITH LAND—*Positive Contracts—Performance in alieno solo—Mandatory Injunction — Purchaser bound by Notice — Admission of Liability.*] A purchaser of a piece of land with a well or spring upon it covenanted with the vendor, who retained land adjoining intended to be disposed of for building-sites, to erect a pump and reservoir, and to supply water from the well to all houses built on the vendor's land:—*Held*, 1, that both the benefit and the burden of the covenant ran with the land, and that the case was not within the second resolution in *Spencer's Case* (5 Rep. 16 a.; 1 Sm. L. C. 60), but if not, a sub-purchaser with notice of the covenant was bound by it:—*Held*, 2, that, though the covenant was not one of which the Court would decree specific performance directly as being for the construction of works which the Court could not superintend, it could be enforced indirectly by an injunction restraining the Defendant from allowing the work to remain unperformed. COOKE *v.* CHILCOTT - - 694

COVENANT TO SETTLE—*Marriage Settlement—Present and Future Property—Contingent Reversionary Interest.*] Covenant in marriage settlement to settle property to which the wife then was or she or her husband in her right should during the coverture become entitled.—At the date of the settlement a trust fund stood so limited that on the death of the wife without issue one moiety thereof would belong to her, subject to the life interest therein of her husband, as her share of an intestate's estate:—*Held*, that the wife's contingent reversionary interest in this fund was bound by the covenant. CORNMELL *v.* KEITH 767

CREDITOR—Outside—Mutual insurance society
See MUTUAL INSURANCE SOCIETY. [522

—— Secured—Proof in bankruptcy - 481, 488
See CREDITOR HOLDING SECURITY. 1, 2.

CREDITOR HOLDING SECURITY — *Creditor voting for Composition without deducting Value of Security.*] A secured creditor who proves his debt under a liquidation petition, without deducting the value of his security, cannot, after a composition has been accepted, be allowed to set up his security. *In re* BALBURNIE. *Ex parte* JAMESON - - - - - - 488

CREDITOR HOLDING SECURITY—*continued.*

2. —— *Proof—Secured Creditor—Joint and Separate Estate—Shares in a Bank belonging to Partners, but standing in the Name of one Partner alone—Lien of Bank on the Shares—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 16 (*sub-s.* 5), 40—*Bankruptcy Rules*, 1870, *rr.* 99, 100.] By the articles of association of a joint-stock bank it was provided that the shares of every shareholder should be always subject to a lien thereon in favour of the bank for all moneys from time to time due from him to the bank in respect of any call, or as a debt or liability to the bank from him alone, or jointly with any other person.—At the commencement of the bankruptcy of two partners some shares in the bank stood in the name of *A.*, one of the two. The shares were in fact partnership property, though the bank did not know that any one but *A.* was interested in them. The partners owed the bank a large debt for moneys advanced to them. The whole of this debt had been contracted since the shares (which were originally the property of *A.* alone) had become partnership property:—*Held* (*dubitante James*, L.J.), that the bank's security was on the joint estate, and that they could only prove against that estate for the balance of their debt after deducting the value of the shares.—*Ex parte Connell* (3 Dea. 201; 3 Mont. & A. 581) followed. *In re* Collie. *Ex parte* Manchester and County Bank - - - - - - 481

DAMAGES—Contract with bankrupt—Disclaimer by trustee - - - - 463
See Disclaimer. 2.

—— Tort—Proof in bankruptcy - - 494
See Proof for Damages.

DEATH BEFORE SHARE PAYABLE—*Settlement — Construction — Words—"Payable"—Trust for Children at Twenty-one or on Marriage and Issue of Children dying before their Shares became "payable."*] By a settlement reciting a royal warrant directing a sum of £1000 to be paid to trustees for the benefit of *A. D.* and *J. D.* and children of *A. D.*, it was declared that the trustees should stand possessed of the £1000 upon trusts for investment and payment, and application of the income to or for the benefit of *A. D.* and *J. D.* during their respective lives, and from and after the deceases of *A. D.* and *J. D.* upon trust to pay, divide, or transfer the £1000, and all dividends or interest which might be due thereon, unto and amongst all and every the child and children of *A. D.*, and the issue of such child and children, if more than one, in equal shares and proportions, and if but one, then the whole to such one, and to be paid and transferred to such children or child as should be sons or a son at the age of twenty-one years, and to such children or child as should be daughters or a daughter at the age of twenty-one years, or day of marriage, whichever should first happen, the issue of any child or children whose parent or parents should die before his, her, or their share or shares should become payable to be entitled to the share or shares which his, her, or their parent or parents would have been entitled to if living. A son of *A. D.* attained twenty-one, and died in the lifetime of *A. D.* leaving a child:—*Held*, that

DEATH BEFORE SHARE PAYABLE—*continued.*

the child of the son so dying was entitled to the parent's share of the trust fund. Day *v.* Radcliffe - - - - - - 654

DEBENTURE — *Creditors — Vendor — Priority—Liquidator's Charges — Costs of Realization — Costs of Preservation—Leaseholds.*] Under agreements made between a company and *G.*, from whom the company had previously bought its works, *G.* was to advance money to the company, and all moneys due to the company were to be received by *G.*, who was to apply these moneys and also the money to be advanced by him in paying wages and salaries and other outgoings for the business of the company, and subject thereto was to repay himself. An order was made for winding up the company, under which *G.* and the liquidators, with the sanction of the Vice-Chancellor, made an agreement for an advance by *G.* of further sums on similar terms. *G.* advanced money for the payment of rent, rates, wages, and outgoings; a large balance remained due to him. The leasehold property, machinery, and plant of the company were sold by the liquidators:—*Held*, varying the order of *Malins*, V.C., that the costs of carrying on the business were not payable out of the mortgaged property in priority to debentures as costs of preservation, and that (subject to the costs of realizing the property) the fund belonged to the debenture holders in priority to the claims of *G.* or the liquidators for the costs so incurred. *In re* Regent's Canal Ironworks Company. *Ex parte* Grissell - - 411

—— Bankruptcy—Scheme of arrangement 445
See Scheme of Arrangement.

—— Mortgage of, by company - - 43
See Borrowing Powers.

—— Waterworks company—Mortmain - 185
See Mortmain.

DEBTOR'S SUMMONS — *Service — Solicitor — Country Agent — Clerk — Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 6, 7, 8—*Bankruptcy Rules*, 1870, *rr.* 21, 61.] When a debtor's summons is served by the creditor's solicitor under rule 61 of the *Bankruptcy Rules*, 1870, the solicitor need not effect the service with his own hand. It may be effected by his clerk, or by the clerk of the country agent of a *London* solicitor. *In re* Lancaster. *Ex parte* Lancaster - - 498

DECEASED PERSON—Written entries - 605
See Evidence.

DECLARATORY DECREE—Demurrer - 359
See Multifariousness.

DEMURRER — Multifariousness — Declaratory decree - - - - 359
See Multifariousness.

DEVISE OF "REAL ESTATE"—*Will—Leaseholds—Contrary Intention—Wills Act* (1 *Vict. c.* 26), *s.* 26.] Testator devised and bequeathed the residue of his real and personal estate upon trust to convert his residuary personal estate, "except leaseholds," and out of the income of the investments and the rents and profits of the real estate to pay certain annuities, and accumulate the residue of the income during his wife's life; and after her death upon trust as to all his "real estate" at, in, or near *E.*, and in or near *W.*, out

DEVISE OF "REAL ESTATE"—*continued.*
of the rents and profits during the life of *J. T. W.* to repair and insure, and to pay an annuity, and subject thereto in trust for *J. T. W.* and his assigns for life, and after his decease for his first and other sons successively in tail male, with remainder to his daughters equally as tenants in common in tail, with limitations over in the nature of cross remainders.—Testator had both freeholds and leaseholds for a term of 1000 years at *E.*; at *W.* he had leaseholds only, for a term of 900 years:—*Held*, that the leaseholds at *E.* and also at *W.* passed under the above devise, the exception of leaseholds in the gift of residue not shewing a contrary intention. MOASE *v.* WHITE [763

DEVISE OF TRUST ESTATES—*General Devise.*] Trust estates held to pass under a general devise notwithstanding a charge of legacies; the devise passing all the real estate vested in the testator whether on trust or beneficially, and the charge affecting only such estate as belongs to him beneficially. *In re* BROWN AND SIBLY'S CONTRACT 156

DIRECTOR'S QUALIFICATION — *Company — Winding-up—Contributory—Fully paid-up Shares —Companies Act*, 1867, *s.* 25.] A limited company was registered on the 6th of November, 1874, with articles of association which provided, amongst other things, that the share qualification of a director should be the holding of twenty-five shares in the company; that *M.* and others should be the first directors of the company; that the first directors (except such of them as should die or vacate their office under the provisions therein contained) should hold office until 1876, and that every director should vacate office by ceasing to be the registered holder of his qualifying number of shares. *M.* attended a meeting of directors on the 10th of November, but resigned office on the 12th, and never afterwards took any part in the affairs of the company. He never applied for any shares, but without his personal knowledge or authority his name was placed on the register for twenty-five shares. The company having been wound up:—*Held*, that *M.* by acting as a director contracted to take twenty-five shares from the company, and that he was properly placed on the register, and must be placed on the list of contributories.—The same articles of association provided that in consideration of the services of the first directors each of them should receive and be registered as the holder of twenty-five fully paid-up shares, which were to be forfeited in the event of his dying, or ceasing to be a director by his own act or default:—*Held*, on a rehearing, that *M.'s* contract was to take fully paid-up shares; and that his name must be removed from the list of contributories. *In re* AUSTRALIAN DIRECT STEAM NAVIGATION. MILLER'S CASE - - - - - - 661

DISCLAIMER—*Leasehold Interest of Bankrupt—Disclaimer by Trustee—Leave of Court—Appeal presented after Execution of Disclaimer—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 23—*Bankruptcy Rules*, 1870, *r.* 143 — *Bankruptcy Rules*, 1871, *r.* 28.] On the application of the trustee in a bankruptcy leave was given to him to disclaim a lease which was vested in the bankrupt. The trustee executed a disclaimer, and

DISCLAIMER—*continued.*
after this had been done, but within the time allowed for bringing an appeal, a person with whom the bankrupt had deposited the lease by way of equitable mortgage, and who was present when the order giving the leave to disclaim was made, gave notice of appeal from the order:—*Held*, that the disclaimer having been executed, the lessor's title was complete: and the appeal was dismissed. *In re* WOODS. *Ex parte* DITTON [459

2. —— *Contract of Bankrupt—Disclaimer by Trustee—Provable Debt—Discharge of Bankrupt—Continuing Contract—Omission of Trustee to disclaim—Performance for a Time—Subsequent Repudiation — Damages occasioned by Breach — Personal Liability of Trustee — Proof against Bankrupt's Estate—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 22, 23, 24, 25 (*sub-s.* 2), 31, 49, 83 (*sub-s.* 7).] If the trustee of a bankrupt, when called upon to decide whether he will disclaim a continuing contract of the bankrupt, does not disclaim it, but carries it on for the benefit of the estate, he is still at liberty, when he finds it unprofitable, to cease to perform it, and in that case the other party to the contract is entitled, under sect. 31 of the *Bankruptcy Act*, 1869, to prove against the bankrupt's estate for the damages occasioned by the breach of the contract, and this is his only remedy.—The trustee does not by not disclaiming adopt the contract, either personally or on behalf of the estate. *In re* SNEEZUM. *Ex parte* DAVIS - - 463

DISCONTINUANCE OF ACTION — *Practice — Rules of Court*, 1875, *Order* XXIII., *Order* XLII., *rr.* 9, 12—*Form of Fi. Fa.* (*No.* 1, *Appendix F.*)—*Recovery of Defendant's Costs.*] Form of writ of *fieri facias* to recover a Defendant's costs where a Plaintiff has given notice of discontinuance of the action under Rules of Court, 1875, Order XXIII., and has made default in payment of the Defendant's costs of the action. BOLTON *v.* BOLTON [276

DISCOUNT—*Agent—Insurance—Commission.*] A shipowner had for several years had an account with merchants who effected for him insurances on his ships. In their accounts they charged him with the full premiums, but they had been allowed by the underwriters, and retained out of the premiums 5 per cent. brokerage and a further 10 per cent. discount for ready money, as usual on insurances. On taking the accounts in a suit respecting a mortgage on some ships the shipowner objected to allow the merchants to retain the 10 per cent.:—*Held*, that as these allowances were usual, and as the shipowner had never inquired on what terms the merchants effected the insurances, and appeared to have accepted their terms, he could not now raise the objection. Order of *Bacon*, V.C. affirmed. BARING *v.* STANTON - - - - - - - 502

2. —— *Proof—Invoice Price of Goods—Discount to be allowed for Cash Payment—Composition—Admission by Debtor of Amount of a Debt.*] Wholesale traders supplied goods to a retail dealer on the terms that he was to be allowed a discount of 20 per cent. from the invoice prices on payment in cash within a month:—*Held* (re-

DISCOUNT—*continued.*
versing the decision of the County Court Judge), that, cash payments not having been made, proof must be admitted in the bankruptcy of the retail dealer for the full amount of the invoice prices of the goods.—*Ex parte Pigou* (3 Madd. 136) not followed.—*Semble*, that a compounding debtor, who allows a creditor to prove without objection at one of the creditors' meetings for a certain sum, cannot afterwards be heard to dispute that that sum is due to the creditor. *In re* Cumberland. *Ex parte* Worthington - - - 803

—— Debentures—Power to issue - - 43
See Borrowing Powers.

DISCRETION — Court of Bankruptcy — Adjudication—Inequitable use of petition 461
See Bankruptcy Petition. 3.

—— Executors - - - - 342
See Charitable Gift.

—— Judge—Appeal - - - - 380
See Striking out Pleadings. 2.

—— Judge—Trial by jury - - - 127
See Trial by Jury.

DISENTAILING DEED—Payment out of Court 61
See Payment out of Court. 1.

DISMISSAL OF ACTION—Motion for judgment—Plaintiff omitting to reply - 793
See Motion for Judgment.

DISMISSAL FOR WANT OF PROSECUTION—*Practice—Rules of Court*, 1875, *Order xxi., r.* 1 (*a*)—*Order xxix., r.* 1—*Default of Pleading.* The Plaintiff being bound to deliver a statement of claim, and not having done so within the six weeks allowed by Order xxi., rule 1 (*a*), the Defendant moved under Order xxix., rule 1, to dismiss the action with costs for want of prosecution. The Court gave the Plaintiff one week's time to take further proceedings, he paying the costs of the motion. Higginbottom *v.* Aynsley - 288

DISMISSAL OF OFFICER—Mutiny Act - 164
See Officer in the Army.

DISSOLUTION OF PARTNERSHIP—Decree for
See Evasive Pleading. [637

DIVIDEND—Liquidation—Order to pay creditor
See Bankruptcy Jurisdiction. 1. [115

DOMICIL—*Acquired Domicil—Naturalization—Abandonment of acquired Domicil—Reverter of Domicil of Origin.*] In order to change his domicil of origin, a man must voluntarily fix his sole or principal residence in a country which is not his country of origin, with the intention of residing there for a period not limited as to time.—The domicil so acquired may be put an end to simply by abandoning it, without acquiring a new domicil of choice, and in such a case the domicil of origin reverts. King *v.* Foxwell - - 518

DOWER—*Satisfaction of—Annuity—Priority.*] A widow is not entitled to priority over other legatees in respect of an annuity bequeathed to her by her husband, "in lieu, bar, and satisfaction of dower," where the only real estate of the testator was conveyed to him with a declaration against dower.—Where both annuities and legacies are charged upon real estate, although the annuitants have power of distress and entry, the annuities will not have priority over the legacies. Roper *v.* Roper - - - - - - 714

EASEMENT—Right of way—Alteration of user
See Way. [812

ELECTION, DOCTRINE OF — *Will — Election against Estate of Person put to Election.*] A testator, entitled under a settlement to a life interest in certain cottages to which his wife became absolutely entitled on his death, purported to devise them to her for life, with remainder to *A.*, who, without knowing of the settlement, sold his supposed reversionary interest to the Plaintiff. The testator's widow, who took other benefits under the will, subsequently sold the cottages to a purchaser without notice of the devise. On the widow's death the Plaintiff claimed compensation against her estate:—*Held*, that the widow had elected to take the cottages against the will, and that *A.* was entitled to compensation for the loss he had sustained in respect of their value at the widow's death, out of her estate to an extent not exceeding the amount of her other benefits under the will. Rogers *v.* Jones - - - 688

ELECTION OF INCUMBENT — Parish church—Right of parishioner - - 233
See Advowson. 1.

ENJOYMENT IN SPECIE—*Ecclesiastical Leases—Trust to renew out of Income — Impossibility of Renewal—Tenant for Life.*] A testator gave to his trustees a tithe rent-charge held under an ecclesiastical lease for twenty-one years, which was in practice renewed every seven years on payment of a fine, upon trust to renew out of the proceeds, and to apply the surplus in a certain way during the life of his wife, and directed that after her death it should form part of his residuary estate. He gave his trustees power at any time to sell the leasehold interest.—The lease having ceased to be renewable:—*Held*, by *Malins*, V.C., that the persons interested during the life of the widow were entitled to receive the rent-charge free from any deductions for raising a renewal fund; and that a renewal fund which had been raised out of the income, but could not be applied for renewal, must be paid to the persons entitled to the income:—*Held*, on appeal, that the leasehold interest ought to be sold and the proceeds invested, and only the income of this fund and of the renewal fund applied as income.—*Tardiff* v. *Robinson* (27 Beav. 629, n.) distinguished. Maddy *v.* Hale - - - - - 327

ESTATE TAIL—Lunatic protector—Advowson [59
See Lunatic Protector of Settlement.

EVASIVE PLEADING — *Rules of Court*, 1875, *Order xix., rr.* 17, 20, 22—*Dissolution of Partnership.*] In an action for dissolution of partnership, the Plaintiffs by their statement of claim alleged that they and the Defendant had agreed to take a lease of certain premises and to enter into partnership; that draft articles of partnership were considered and approved by the Plaintiffs and Defendant at an interview on a day named, subject to their being finally revised by the Defendant's solicitor; that the draft articles had not yet been revised, nor the articles executed; that, although the draft articles were only settled subject to revision, the terms of the arrangement between the Plaintiffs and Defendant as therein provided were definitely agreed upon at the said interview; that the Defendant had not intimated any objection

EVASIVE PLEADING—*continued.*
to the terms of the articles; that it was soon afterwards agreed that certain sums should be brought in by the Plaintiffs and Defendant; that they had proceeded with the partnership undertaking, and the Defendant had taken an active part in it, but that he had not contributed his share, and notice had been given him to withdraw from the undertaking.—The Defendant, in his statement of defence, admitted that he had agreed to enter into partnership as alleged, and added, "The Defendant denies that the terms of the arrangement between himself and the Plaintiffs were definitely agreed upon as alleged":—*Held*, that the denial was evasive within Rules of Court, 1875, Order XIX., rule 22:—*Held*, also, upon motion for judgment on admissions of fact in the pleadings under Order XL., rule 11, that there should be a decree for dissolution, with an inquiry, if desired by the Defendant, as to the terms of the arrangement for partnership.—Observations on the strictness with which the rules as to pleading should be construed by the Court, having regard to Order XIX., rules 17, 20, 22. THORP *v.* HOLDSWORTH - - - 637

EVIDENCE — *Admissibility — Written Entries by Deceased Person.*] Where an entry in the handwriting of a deceased person is *primâ facie* against his interest, it is admissible as evidence for all purposes, irrespective of its effect or value when received. The following entry in the handwriting of a deceased person, "*J. W.* paid me three months' interest," which was followed by other entries pointing to a loan to *J. W.*:—*Held*, to be admissible as evidence, whether or not the effect of it when admitted would be to establish the existence of a debt due to the testator. TAYLOR *v.* WITHAM. WITHAM *v.* TAYLOR - 605

—— Adjudication of bankruptcy - 322, 452
See BANKRUPTCY PETITION. 1, 2.

—— Patent—Prior invention in *America* 134
See PATENT. 1.

EXAMINATION OF LIQUIDATING DEBTOR—*Liquidation—Summoning Debtor for Examination—Default in giving Information to Trustee—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 96, 125—*Bankruptcy Rules*, 1870, *rr.* 171, 301.] The trustee under a liquidation cannot summon the debtor in a summary way for examination under sect. 96 of the *Bankruptcy Act*, 1869.—He must first make out a *primâ facie* case of default by the debtor under rule 301 of the Bankruptcy Rules, 1870, and the debtor is then entitled to be heard on the question whether the summons should issue. *In re* BENNETT. *Ex parte* GLAVE - 315

EXCESSIVE APPOINTMENT—*Power of Appointment—Legacy under Will in exercise of Power void for Excess—Void Legacy not undisposed of but falling into Residue.*] Under an exclusive power to appoint to children, the children being entitled in default of appointment in equal shares, the donee, by will, appointed the whole fund to trustees, upon trust as to £1200, to pay the income to one of her children, *J.*, for life, and after his death, for his children; and if *J.* should die without leaving children who should attain vested interests, then that the £1200 should be "added to and form part of the residue of" the trust estate. The trusts of the residue were in favour of daughters for life with testamentary powers. *J.* died leaving children.—It being admitted that the gift to *J.*'s children was excessive:—*Held*, that on *J.*'s death the £1200 was not undisposed of, but was well appointed by the residuary gift. *In re* MEREDITH'S TRUSTS - - - 757

EXCHANGE—Power of partition - - 618
See PARTITION.

EXCLUSIVE RIGHT OF SALE - - 228
See RESTRAINT OF TRADE.

EXECUTION CREDITOR—*Composition—Writ delivered to Sheriff after filing of Petition.*] On the filing of a liquidation petition an injunction was at once granted *ex parte*, restraining a creditor from proceeding further in an action in which he had recovered judgment against the debtor. The next day the creditor delivered a writ of *fi. fa.* to the sheriff. He did not deny that, before he did so, he knew of the restraining order. The creditors resolved upon a composition:—*Held*, that the judgment creditor was not entitled, after the registration of the resolution, to enforce his execution against the debtor.—*Ex parte Jones* (Law Rep. 10 Ch. 663) distinguished. *In re* LEWIS. *Ex parte* MAUTHNER - - - 113

2. —— *Composition—Writ delivered to Sheriff before filing of Petition—Seizure after Registration of Resolutions—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 12, 16, 40, 126.] A judgment creditor delivered a writ of *fi. fa.* to the sheriff before the debtor filed a liquidation petition, but no seizure was made until after the creditors had resolved to accept a composition, the resolutions had been registered, and the debtor had paid the amount of the composition to a trustee appointed by the creditors:—*Held*, that the execution creditor was not a creditor holding a security at the time when the composition became binding, and that he could not enforce his writ against the debtor's goods afterwards.—*Ex parte Jones* (Law Rep. 10 Ch. 663) explained. *In re* BALBIRNIE. *Ex parte* JAMESON - - - - 488

EXECUTOR—Breach of trust—Lien on executor's interest - - - - 508
See LIEN FOR BREACH OF TRUST.

—— Charitable gift at their discretion - 342
See CHARITABLE GIFT.

—— *De son tort* - - - - 198
See EXECUTOR DE SON TORT.

—— Payment to legatee under mistake of law
See MISTAKE OF LAW. [351

EXECUTOR DE SON TORT—*Administration—Executors who have not proved.*] A creditor of a testator brought an action against the executors, who had not proved but had got in part of the assets in *Australia*, alleging that they had paid some of the legacies, but refused to pay the funeral expenses and debts; and also against other Defendants, alleging that they had got in a portion of the assets in *England*, and that they threatened to dispose of such assets without regard to the debts. The Plaintiff claimed as against the executors, administration of the estate and payment of the debts; and against the other Defendants he claimed an injunction to restrain them from parting with the assets:—*Held*, upon

EXECUTOR DE SON TORT—*continued.*
demurrer to the claim, that the executors were rightly sued although they had not proved; and that the other Defendants were properly made parties as executors *de son tort*.—*Rowsell* v. *Morris* (Law Rep. 17 Eq. 20) commented upon. *In re* Lovett. Ambler *v.* Lindsay - - 198

EXECUTORY LIMITATION—*Will—Destination of Rents till happening of Event.*] A testator devised estates to trustees and their heirs upon trust to accumulate the rents until the expiration of the term of twenty-one years, and after the expiration thereof to stand possessed of the estates in trust for the second and every other younger son successively of his nephew *W.* in tail male, and failing such issue, in trust for the first and every other son of his nephew *H.* in tail mail, with divers limitations over; and he gave a fund of personal estate to be held on similar trusts. At the expiration of the term *W.* and *H.* were both living, and each had an only son:—*Held* (affirming the decision of *Bacon*, V.C.), that until it should be ascertained whether there would be a second son of *W.*, the rents of the real estates and the income of the personal estate were undisposed of and belonged respectively to the heir-at-law and next of kin.—*Sidney* v. *Wilmer* (4 D. J. & S. 84) not followed. Wade-Gery *v.* Handley - 374

FACTOR—Bankruptcy—Lien - - 795
See Order and Disposition.

"FAMILY"—Gift to - - - 672
See Gift to Family.

FAMILY ARRANGEMENT - - - 429
See Fraudulent Appointment.

FORECLOSURE — *Decree — Order for Personal Payment.*] An order for personal payment may be combined with an order for foreclosure. Dymond *v.* Croft - - - - 512

—— Joinder with action for administration of trusts - - - - 629
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See Patent. 1.

FRAUD—Appointment—Void condition - 429
See Fraudulent Appointment.

—— Jurisdiction of Probate Court—Will of personal estate - - - - 27
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—— Petition for adjudication—Inequitable use of - - - - - 461
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FRAUDS, STATUTE OF (29 *Car.* 2, *c.* 3, *s.* 4)—*Memorandum of Agreement—Signature by Agent.*] *W.* entered into a verbal agreement with *A.* to sell him an inn called the *Lion Inn* for £950. On the following day *W.'s* solicitor wrote to *A.'s* solicitor:—"*W.* has been with us to-day, and stated that he had arranged with your client *A.* for the sale to the latter of the *Lion Inn* for £950. We therefore send herewith draft contract for your perusal and approval":—*Held* (reversing the decision of *Malins*, V.C.), that this letter was not such a note or memorandum of an agreement as is required by the *Statute of Frauds*.—Smith *v.* Webster - - - - - 49

FRAUDULENT APPOINTMENT—*Void Condition annexed to Appointment—Benefit of Appointee—Contemporaneous Re-settlement—Family Arrangement.*] Under a marriage settlement made in 1820, a father had a power of appointment among his children. He afterwards borrowed the funds subject to the power, amounting to £6000, from the trustees of the settlement, on the security of a freehold estate which was his own property.—On the marriage of his only daughter in 1853, the father settled a sum of £3000 upon her out of his own property.—In 1863, the father executed three deeds of even date. By the first, he made a voluntary settlement of the freehold estate with some other property on his eldest son, *E.*, for his life, with remainder for the benefit of *E.'s* children or remoter issue, as *E.* should appoint, and in default of appointment, to *E.'s* children equally, and in default of children, to himself in fee.—By a second deed, the father appointed the whole of the £6000 under his marriage settlement to *E.*, absolutely; and the same deed contained a release by the father and his wife, and also by *E.* and the surviving trustee of the settlement, of the mortgage debt of £6000, and a conveyance by the same parties of the freehold estate discharged from the mortgage to the uses of the voluntary settlement of even date.—By a third deed, the father gave the residue of his property to his only other son, *R.*—The father made his will, bearing the same date, and thereby confirmed the three deeds of even date, and charged his ultimate remainder under the first deed with £3000, in favour of his only daughter, *M.*, and subject thereto, gave the same to *R.*—The father died in 1864.—*E.*, although made a party to the two first-mentioned deeds of even date, was not consulted on their preparation, and he at first refused to execute them, but he did in fact execute them in the year 1871:—*Held* (reversing the decision of *Malins*, V.C.), that in the opinion of the Court the arrangement by which the mortgage debt of £6000 had been released and the ultimate remainder reserved to the father had not been made for the purpose of benefiting the appointor; and that the appointment was not fraudulent or invalid:—*Held*, also, that the condition annexed to the appointment, that *E.* should release the estate from the mortgage debt, was not binding upon *E.* until he assented to the arrangement; and that he might have claimed the benefit of the absolute appointment in his favour discharged from the condition, but that, having executed the deeds, he had by his voluntary act assented to be bound by the conditions.—*Re Marsden's Trust* (4 Drew. 594) and *Topham* v. *Duke of Portland* (Law Rep. 5 Ch. 40) distinguished. Roach *v.* Trood - - 429

FRAUDULENT CONVEYANCE—*Voluntary Settlement—Life Estate reserved to Settlor determinable on Bankruptcy—*13 *Eliz. c.* 5.] In 1858 a man, who was not then engaged in trade, and who owed no debts, made a voluntary settlement of a sum of £1000. The trusts of the deed were, a life estate to himself determinable on bankruptcy, then a life estate to his wife for her separate use, then trusts for the children of the marriage, and an ultimate remainder to the settlor. In 1873 he for the first time engaged in trade. In 1875 he was adjudicated a bankrupt:—*Held*, that the

FRAUDULENT CONVEYANCE—*continued.*
settlement was void *in toto* as against the trustee in the bankruptcy. *In re* Pearson. *Ex parte* Stephens - - - - - 807

FURNITURE—Bequest of—Removal to another house - - - - 302
See Heirlooms. 1.

GIFT TO FAMILY — *Will — Construction— "Family."*] The primary meaning of the word "family" in a will is "children."—A testator directed the interest arising from all his real and personal property to be paid to his wife during her life, and after her decease to be equally divided amongst all his family that should be then living when they should attain the age of twenty-one years. At the date of his will he had seven children living, some over and others under twenty-one, and some married, with children:—*Held*, that under the word "family" children alone could take. Pigg *v.* Clarke - - 672

GOODWILL — Mortgage — Compensation under Lands Clauses Act - - - 36
See Compensation under Lands Clauses Act.

HEIRLOOMS—*Will—Bequest of Furniture, &c., in Testator's Capital Messuage—Furniture, &c., stored in another House included in the Bequest.*] Testator bequeathed all his household furniture which should be in his capital messuage at his death, unto trustees upon trust to permit the same to be held and enjoyed as heirlooms with his said messuage by the person entitled to the same messuage under the will. The testator, who died in 1875, was, in 1874, the occupier of a house at *Bath*, which he had furnished. He ceased to occupy that house in 1874, and removed the furniture with the intention of its being placed in his capital messuage, which was in the occupation of a tenant. The tenant having declined to permit the furniture to be placed therein, it was, in consequence of such refusal, stored in farm buildings belonging to the testator, where it was at his death:—*Held*, that the furniture passed under the bequest. Rawlinson *v.* Rawlinson - - - 302

2. —— *Sale—Jurisdiction.*] The Court has no jurisdiction to order a sale of heirlooms which are settled in strict settlement, simply on the ground that a sale would be for the benefit of all parties interested. D'Eyncourt *v.* Gregory 635

HUSBAND AND WIFE—Conveyance by married woman - - - 633, 650
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—— Separate estate of wife—Liability - 587
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—— Will of wife—Separate property - 194
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ILLEGITIMATE CHILDREN — *Will — Gift to "Children" of Testator's Daughter—Illegitimate Child en Ventre sa Mère at Date of Will and of Testator's Death.*] A bequest in favour of a woman's illegitimate child *en ventre sa mère* at the date of the will though not born until after the testator's death, is not contrary to public policy.—A testator, whose daughter *M.* had with his knowledge gone through the ceremony of marriage with *J. C.*, her deceased sister's husband, and had had two children by him, made his will at a time when he knew she was again *enceinte*. He thereby gave leaseholds to trustees on trust for "my daughter *M.*, the wife of *J. C.*," for her life, with remainder to "the child or children of my said daughter *M. C.*" as she should appoint, and in default for her child or children equally, and if none, then over. The testator died three months before the third child was born. *M.* appointed to the two children born at the date of the will, the child of which she was then *enceinte*, and a fourth child begotten and born after the testator's death.—The House of Lords having decided that the two children born at the date of the will were sufficiently designated, and that they took under the gift in the will:—*Held*, that the child *en ventre sa mère* at the date of the will also took under the gift, but that the child begotten and born after the testator's death could not take. Crook *v.* Hill 773

ILLEGITIMATE CHILDREN—*continued.*

INCOME AND CAPITAL—Calls on shares 752
See Liability for Calls.

INCOMPLETE SETTLEMENT—Confirmed by will [269
See Testamentary Paper.

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INDORSEMENT—Policy of insurance—Amalgamation of companies - - 391
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INFANT — Practice — Trustee Act — Beneficial interest - - - - 304
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INJUNCTION IN BANKRUPTCY—*Notice of Motion—Service by Post — Bankruptcy Rules*, 1870, *rr.* 14, 50, 51, 52.] Notice of an application to continue an interim injunction may be properly served by post under rule 14 of the Bankruptcy Rules, 1870.—*Re Verner* (15 Sol. J. 697) overruled. *In re* Lewis. *Ex parte* Mauthner - 113

INROLMENT—Transfer of shares - 10, 21
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INSURANCE AGENT—Discount—Companies
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INTEREST IN LAND—Mortmain Act—Debenture of waterworks company - 185
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IRISH ACTION—Stay of proceedings - 594
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JAMAICA—Land in Statute of Limitations 295
See Limitations, Statute of. 2.

JOINDER OF CAUSES OF ACTION—*Practice—Action for Recovery of Land—Foreclosure Action—Rules of Court*, 1875, *Order xvii., r.* 2.] A foreclosure action is not an action for the recovery of land within the meaning of Rules of Court, 1875, Order xvii., rule 2. Tawell *v.* Slate Company [629

JOINDER OF ISSUE—*Practice—Pleading—Form of Reply—Plea in Nature of New Assignment—Erroneous Form—Rules of Court*, 1875, *Orders xix., rr.* 2, 4, 14; *xxiv., rr.* 2, 3; *xxv.; xxix., r.* 12; *xxxvi., r.* 3; *Forms of Pleading, Nos.* 6, 9.] A reply, which begins by joining issue with Defendant in his defence, and then goes on to confess and avoid, is erroneous in form; the frame of the Form No. 6, "Reply," in the 1st schedule, Appendix (C), to the *Judicature Act*, 1875, notwithstanding.—Where, after statement of claim and defence, Plaintiff replied, joining issue on the defence, and then pleading in confession and avoidance, and the Defendant took no further step till long after notice of trial had been served:—Leave was, under the powers of the Court for extending time, given to the Defendant, to join issue on the second pleading in the reply. Earp *v.* Henderson 254

—— Counter claim—Reply - - - 106
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—— Chancery—Trustee Act—Person of unsound mind - - - - - 112
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—— Probate Court—Will of personal estate—Fraud - - - - 27
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JURY—Trial by - - - - 127
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LAND—Held as money - - - 743
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—— Repetition of - - - - 738
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LEGACY, SPECIFIC OR GENERAL—*Will—Construction—Bequest of "all my Personal Property."*] A gift by will by a testator to his wife of "all my personal property, all sums of money which I may possess or may be owing to me at the time of my decease, together with all the furniture, farming implements," and other things in the family mansion, is not specific. Fairer *v.* Park - - 309

LEGAL ESTATE—Trustee guilty of breach of trust—Lien on his interest - 508
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—— Calls—Deceased shareholder—Shares taken by trustees - - - - 752
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—— Married woman—General engagements—Separate estate - - - 587
See Separate Estate of Wife.

—— Transfer of—Amalgamation of companies [1, 10, 21, 384, 391
See Amalgamation of Companies. 1—5.

LIABILITY FOR CALLS—*Administration—Shares in a Company belonging to Testator at his Death—Shares allotted to and accepted by Testator's Trustees after his Death—Calls, whether payable out of Income or out of Capital.*] Testator bequeathed residuary personalty to trustees, with permission to continue existing investments, upon trust to convert, and invest in, amongst other securities, the stock or shares of any company in *Great Britain*, and pay the income to a tenant for life, with remainder over. He declared that "the calls, if any, which at or after my decease may be or become due in respect of any shares for the time being constituting part of my residuary personal estate, shall be paid by" the trustees out of income, and not out of capital.—Testator at his death held waterworks and railway shares, upon which some instalments were due, but not yet payable.—After the testator's death the trustees sold some shares on which a call was actually payable, and allowed the brokers to retain the amount of the call out of the sale moneys, for the benefit of the purchaser.—After the testator's death the trustees accepted allotments of valuable shares offered to them in respect of their proprietorship in the company:—*Held*, that the instalments due on shares accepted by the testator in his lifetime, when payable, and the amount of the call moneys deducted on the occasion of the sale, were calls within the meaning of the will, and hence payable out of income:—*Held*, further, that the shares accepted by the trustees did not constitute part of the testator's residuary personal estate at his death, and hence that the calls on such shares were payable out of capital. Bevan *v.* Waterhouse - - 752

LICENSE—Patent - - - - 134
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LIEN—Banker—Shares standing in name of one partner - - - - 481
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—— Breach of trust—Beneficial interest of trustee guilty of - - - - 508
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—— Solicitor - - - - - 317
See SOLICITOR'S LIEN.

LIEN FOR BREACH OF TRUST—*Devise—Trustee—Legal Estate.*] A testator devised certain real estate for life to one of his executors and trustees: the devisee afterwards committed breaches of trust and then filed a petition for liquidation:—*Held* affirming the decision of the Vice-Chancellor of the Palatine Court), that, as against the trustee in the liquidation, the life estate of the executor and trustee being legal, could not be taken and applied in replacing losses occasioned by the breaches of trust. FOX *v.* BUCKLEY - - - 508

LIFE ESTATE—Failure of—Acceleration of remainder - - - - 703
See ACCELERATION OF REMAINDER.

LIMITATIONS, STATUTE OF—*Common Law Procedure Act*, 1852, *s.* 11—*Administration Suit.*] A creditor issued a writ in the Common Pleas against an administrator for a debt not then barred by statute. Within six months after the issuing of his writ (which was never served), at which time the debt was barred unless saved by the writ, the creditor took out an administration summons:—*Held*, that the writ only saved the bar for six months in the Court of Common Pleas, and that the statute was a bar to the administration suit. MANBY *v.* MANBY - - - - 101

2. —— (3 & 4 *Will.* 4, *c.* 27)—*Foreign Real Estate—Annuity charged on Estate in Jamaica—Last Payment in* 1842—*Rents and Profits received since* 1870—*Arrears.*] By will in 1810, *B.* devised to trustees his estate in *Jamaica* to hold to the use that *H.* should, out of the rents and profits, receive for life an annuity payable quarterly for her separate use, with powers of distress and entry and reception of the rents and profits, and after her decease to the use that the trustees should pay the annuity unto her children, as she should appoint, or their lives.—The testator gave other annuities out of the rents and profits of the same estate, and gave the estate to the use of his son for life, with remainders over. The last payment on account of *H.*'s annuity was in 1842. *H.* died in 1853. She made an appointment, and arrears were due to her and her appointees. The estate was for some years a waste, and no rents and profits were received till 1870, and when received they were paid into Court:—*Held*, that the *Statute of Limitations* (3 & 4 Will. 4, c. 27) did not apply to *Jamaica*, and that the legal personal representative of *H.* was entitled to be paid the arrears due to her. PITT *v.* LORD DACRE - - 295

LIQUIDATION BY ARRANGEMENT—Costs of petition in bankruptcy - - 320
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—— Charges upon priority debenture-holder 411
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LUNACY—Barring estate tail—Lunatic protector [59
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LUNATIC PROTECTOR OF SETTLEMENT—*Advowson—Consent of Court to barring Entail—Interest of Lunatic.*] A lunatic was tenant for life of the advowson of a rectory and other real estate. Under the order of the Court a lease of the property for ninety-nine years, if the lunatic should so long live, had been made to two persons at a large rent. This lease had become vested in the administrator of the survivor of the two lessees, the administrator being also the first tenant in tail in remainder expectant on the death of the lunatic without issue male. The lunatic was aged eighty-two, and had never had any issue. The administrator wished to sell the next presentation to the rectory, and petitioned the Court, as protector of the settlement, to consent to the barring of the entail of the advowson so far as might be necessary for effecting the proposed sale:—*Held*, that, as the application was not for the benefit of the lunatic's estate, but only for the benefit of a collateral, the Court ought not to interfere. *In re* THARP - - - 59

MANDATORY INJUNCTION—Erecting pump and reservoir - - - 694
See COVENANT RUNNING WITH LAND.

MANOR—Minerals—Removal of—Right of copyholder to soil - - - 826
See MINERALS.

MANSION-HOUSE—Rebuilding—Personalty on same trusts as land - - 743
See ACCUMULATIONS.

MARRIAGE SETTLEMENT—Covenant to settle after-acquired property - - 767
See COVENANT TO SETTLE.

MARSHALLING—*Pecuniary Legacies—Residuary Devises—Insufficient Personalty—Hensman v. Fryer not followed.*] Where there is a bequest of pecuniary legacies and devises of real and residuary real estates, and an insufficient amount of personalty for the payment of debts, the pecuniary legacies must be first resorted to to make up

MARSHALLING—*continued.*
the deficiency.—*Collins* v. *Lewis* (Law Rep. 8 Eq. 708), *Dugdale* v. *Dugdale* (Law Rep. 14 Eq. 234), and *Tomkins* v. *Colthurst* (1 Ch. D. 626), followed; and *Hensman* v. *Fryer* (Law Rep. 3 Ch. 420) not followed. Farquharson *v.* Floyer - 109

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See Officer in the Army.

MINERALS — *Copyholds — Mines and Minerals. Lessee of—Possession of Soil by Copyholder—Carriage of Non-manorial Minerals over and under Copyholds—Acquiescence—Injunction.*] In an ordinary copyhold manor the estate of the copyholder is in the soil throughout except as regards trees, mines, and minerals, the property in which remains in the lord. When the lord has removed minerals the space left belongs to the copyholder. The right of the lord is not like that of a vendor of freeholds who has reserved mines, and remains the owner of the vacant space from which minerals have been removed.—In a Crown manor, where the Crown and its lessees were by custom entitled to enter on the land for the purpose of working the minerals, the Defendant, the lessee of the Crown mines, who was also lessee of the *S.* mine outside the manor, claimed a right to use a crut or underground way beneath the land of the Plaintiffs, who were copyholders of part of the manor, for the purpose of conveying minerals from the *S.* mine to the deep pit by which the manorial mines were worked, and thence by a branch railway constructed by the Defendant over part of the same copyhold to the main line:—*Held*, that such user was a trespass, and that, no case of acquiescence on the part of the Plaintiffs or their predecessor in title having been established, they were entitled to an injunction to restrain the Defendant from carrying the *S.* minerals over or under their copyhold land. Eardley *v.* Granville - - - - - 826

MISREPRESENTATION IN PROSPECTUS—*Companies Act*, 1867, *s.* 38—*Promoter—Omission of Statement of Contract from Prospectus—Suit in the Nature of Action for Deceit—Fraudulent Misrepresentation not proved.*] Plaintiff and Defendant, being both interested, with others, in mines which required the use of coal, Defendant, on the 26th of March, 1873, wrote to the Plaintiff, amongst others, a letter, mentioning a property consisting partly of smelting works and partly of a colliery then for sale, recommending it as a first-class investment, and offering it to the Plaintiff and others in the terms of a prospectus about to be issued. The latter mentioned the capital of and number of shares in a company proposed to be formed for the working of the businesses. On the 10th of May, 1873, Defendant contracted to purchase the property for £16,125 in cash, to be paid by instalments. By another agreement, dated the 29th of May, 1873, Defendant agreed to sell the property to two persons, expressly as trustees for the intended company, for £23,725 in cash, also to be paid by instalments. On the 2nd of June, 1873, a prospectus was issued, in which the name of the Defendant appeared as managing director, and in which the contract of the 29th of May, 1873, was the only one referred to; and on the 9th of June, 1873, Plaintiff agreed to take 200 shares of £5 each in the company, which was registered on the 16th of July, 1873.—At the hearing of a suit, in which the Plaintiff prayed for a declaration that he was induced to take the shares by the fraud and deceit of the Defendant, it was contended that the contract of the 10th of May, 1873, ought to have been specified in the prospectus:—*Held*, that the omission in the prospectus of mention of the contract of the 10th of May, 1873, was not fraudulent within the meaning of the 38th section of the *Companies Act*, 1867; and inasmuch as upon the evidence the statements in the letter and prospectus did not amount to misrepresentation either within the knowledge of the Defendant, or in fact, the bill was dismissed. Craig *v.* Phillips - - - - - 722

MISREPRESENTATION IN PROSPECTUS—*cont.*

MISTAKE—Goods sent to undischarged debtor 123
See Undischarged Debtor.

—— Law—Order in winding-up - - 522
See Mutual Insurance Society.

—— Mutual - - - - - 779
See Conditions of Sale.

—— Settlement—Rectification - - 214
See Rectification of Settlement.

MISTAKE OF LAW—*Payment—Assent—Repayment.*] The Court will not in all cases relieve against a payment of money under mistake of law.—An executor, acting on the advice of counsel on the construction of a will, proposed to divide in certain proportions a fund between two legatees. One of the legatees being dissatisfied took the opinion of counsel, which agreed with the former opinion. The executor then divided and paid over the fund in accordance with the opinions. Two years afterwards the dissatisfied legatee filed a bill against the executor and the other legatee, alleging that the will had been wrongly construed, and claiming repayment from the other legatee:—*Held* (affirming the decision of *Hall*, V.C.), that the suit could not be maintained.—*Davis* v. *Morier* (2 Coll. 303) distinguished. Rogers *v.* Ingham [351

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—— Power of sale - - - - 600
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—— Trustees—Vesting order—Trustee Act 209
See Trustee Acts. 2.

—— Unregistered - - - - 669
See Unregistered Mortgage.

MORTMAIN — *Will — Construction — Interest in Land—Debenture of Waterworks Company.*] A debenture of a waterworks company, in the form provided by Sched. C. to the *Companies Clauses Act*, 1845, by which the undertaking, including the town rates, was charged with the repayment of the sum advanced:—*Held*, not to be an interest in land within the *Mortmain Act*. Holdsworth *v.* Davenport - - - - - 185

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See Counter-claim.

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—— For judgment—By Defendant - 793
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—— For judgment—Notice—Service on proper officer - - - 512, 516
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MOTION FOR JUDGMENT—*Practice—Rules of Court*, 1875, *Orders* XXIV., *r.* 1; XXXVI., *r.* 4, 4*a*; XL., *r.* 11—"*Relief.*"] A Defendant delivered a statement of defence which, if uncontradicted, was a good defence to the Plaintiff's claim; and the Plaintiff did not reply or obtain further time within the three weeks limited by Order XXIV., rule 1.—The Defendant then, before the expiration of the six weeks within which a Plaintiff must, under Order XXXVI., rule 4, give notice of trial, moved under Order XL., rule 11, that the action might be dismissed with costs, on the ground that, by not replying, the Plaintiff had admitted the defence within that rule:—*Held*, that a Defendant seeking to dismiss an action under such circumstances was not a "party applying for relief" within the meaning of the rule. Litton *v.* Litton - - - - 793

MULTIFARIOUSNESS—*Pleading—Demurrer—Declaratory Decree—Specific Performance*—15 & 16 *Vict. c.* 86, *s.* 50—*Rules of Court*, 1875, *Order* XVI., *rr.* 4, 13; *Order* XVII., *rr.* 1, 8, 9.] By a marriage settlement real estate was limited to such uses as the husband and wife should appoint, and, in default of appointment, to the use of the trustees during the life of the wife, on trust for her, for her separate use, with remainder to the husband in fee. The husband entered into a contract to sell the property, the purchaser having notice of the provisions of the settlement. The purchase-money was paid to the trustees of the settlement, and a draft conveyance was approved, in the form of an appointment by the husband and wife to the purchaser, but before the conveyance had been executed the husband suddenly died, having, by a will dated before the contract, devised all his real estate to trustees upon trust for his widow for life, and after her death to sell and divide the proceeds as therein directed.—The widow, who was one of the executors, brought an action against the purchaser, the other executors, and the devisees in trust under the husband's will, asking the Court to determine whether she could be compelled to concur in the conveyance to the purchaser, what was the effect of the contract for sale, what would be the devolution of the purchase-money if the contract should be completed, and whether, if the contract was completed by the trustees of the settlement alone, the purchaser would be entitled to compensation out of the purchase-money in respect of the Plaintiff's life interest:—*Held*, that the statement of claim was not open to demurrer by the purchaser on the ground that he was not interested in all the questions raised, or on the ground that only a declaratory decree was asked for.—The purchaser also brought an action for specific performance of the contract for sale, subject to the

MULTIFARIOUSNESS—*continued.*
widow's life interest, with compensation in respect of that life interest out of the testator's personal estate, and claiming a lien on the purchase-money. The Defendants to this action were the widow, the executors, and the devisees in trust. The devisees in trust and the executors having demurred to the statement of claim, the devisees disclaiming at the same time all interest in the purchase-money:—The demurrers were ordered to stand to the hearing of the action.—Decision of *Bacon*, V.C., affirmed. Cox *v.* Barker. Barker *v.* Cox - - - - - - 359

MUTINY ACT—Dismissal of officer - - 164
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MUTUAL INSURANCE SOCIETY—*Winding-up Order, Error in—Costs—Outside Debts.*] In 1870 an unregistered mutual marine insurance association was ordered to be wound up. Under the winding-up, debts to policy-holders were proved to the amount of £17,000, and debts in respect of rent of offices, goods supplied, &c., to the amount of £500; and a certificate was made finding these debts due from the association. In 1875, upon the application of contributories, the debts due to policy-holders were expunged from the certificate, but no application had been made to expunge those due to the outside creditors. Upon an application by the liquidator for a call of £135 upon each contributory for payment of the debts and costs of winding up, amounting to about £7000:—*Held*, that a call must be made as asked:—*Held*, also, that so long as the certificate remained unimpeached, the Court could not treat the debts due to outside creditors as not being due from the association, even though the winding-up had been ordered under a mistake of law.—*In re London Marine Insurance Association* (Law Rep. 8 Eq. 176) commented on. *In re* Arthur Average Association - - - - - 522

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—— Attachment - - - - 190
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OCCUPATION—Road—Alteration of user - 812
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OFFICER IN THE ARMY—*Tenure of Office—Liability to Dismissal—Permanent Appointment—Mutiny Act.*] Every officer in Her Majesty's army holds his office subject to the will of the Crown, and is liable to be dismissed at any moment without cause assigned; and there is no such thing as a military appointment permanent in the sense of being tenable for life, or until the holder is disqualified by misconduct or incapacity from fulfilling the duties attached to it. Therefore where a medical officer in the army was at his request, and on condition of waiving his right to promotion, appointed to the permanent medical charge of the military prison at *Dublin*:—*Held*, 1, that as a military officer he was subject to the rules and regulations of the service, and the Court had no jurisdiction on a petition of right or any other proceeding to inquire into the circumstances under which he ceased to hold the office; 2, that the office, like all others in the army, was only tenable *durante bene placito*. *In re* Tufnell - 164

OFFICIAL REFEREE—*Practice—Judicature Act*, 1873, *s.* 57—*Question of Account.*] The expression "questions of account" in the 57th section of the *Judicature Act*, 1873, will receive a large construction.—A claim made in an administration suit by a dealer in works of art against the estate of the testator for £19,000, the aggregate prices of twenty-four items, consisting of pictures and articles of vertu supplied to the testator in his lifetime, and specified in an account delivered to his executor, was, on the application of the executor under that section, ordered to be tried before the official referee. *In re* Leigh, Deceased. Rowcliffe *v.* Leigh - - - - 292

ORDER—Consent—Inadvertence - - 177
See Order by Consent.

—— Foreclosure—Personal payment - 512
See Foreclosure. 1.

—— Interlocutory—Production of - - 80
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—— Interlocutory, refusal of—Time for appealing
See Appeal. 2. [127

ORDER AND DISPOSITION—*Reputed Ownership—Factor—Lien—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 15.] *S.*, who had for many years traded as a timber merchant in his own name, entered into an agreement with *F. & Co.*, who were also timber merchants, to carry on his business thenceforth as their agent at a remuneration by way of a share of profits. The business was thenceforth carried on under this agreement, but in the name of *S.* as before. *S.* dealt with the timber in his possession as if he were the absolute owner of it (except as between himself and *F. & Co.*), and there was nothing done to inform the outside world of the change which had taken place. In the course of the business *F. & Co.* drew bills on *S.*, which he accepted in his own name to be protected by *F. & Co.* Both *F. & Co.* and afterwards *S.* filed liquidation petitions.—Before *S.'s* liquidation, *F. & Co.'s* trustee demanded the timber in his hands, which was refused:—*Held*, that, to the extent of the current bills, *S.'s* estate had a lien on the timber.—*Semble*, the reputed ownership clause applies to goods in the hands of a factor, unless the relation of principal and factor is notorious. *In re* Fawcus. *Ex parte* Buck - - - - - - 795

ORDER BY CONSENT—*Motion to discharge—Inadvertence.*] A consent given by counsel in the presence and with the sanction of his client may be withdrawn before the order is drawn up, if given through inadvertence, but not so where the matter was fully understood at the time and the client shortly afterwards changes his mind. Holt *v.* Jesse - - - - - 177

PAID-UP SHARES—Director's qualification 661
See Director's Qualification.

PARISHIONERS—Right to elect incumbent 233
See Advowson. 1.

PARTIES—Alteration of—Adding Plaintiff 277
See Amendment of Pleadings.

PARTITION—*Power of Sale and Exchange—Vendor and Purchaser—Title.*] A power of exchange of lands is properly executed by a partition.—Accordingly, where an undivided moiety of lands was vested in *A.*, *B.*, and *C.*, as trustees of a settlement which expressly authorized a partition, and the other moiety was vested in *D.*, *E.*, and *F.*, as trustees of a settlement, with power to sell, dispose of, convey, and assign the said hereditaments for such a price in money, or for such an equivalent or recompense in lands and hereditaments as to the trustees shall seem reasonable, and for that purpose to revoke the old uses and to limit other uses and trusts, and a partition deed, purporting to be in exercise of the said powers, was executed by the trustees of the two moieties:—*Held*, that the partition was properly effected by *D.*, *E.*, and *F.*, under their power.—*Semble*, a partition between any number of persons might properly be effected under a similar power.—The *dictum* in *Sheppard's* Touchstone (page 292), that "joint tenants, tenants in common, and coparceners cannot exchange the lands they do so hold with another before they have made partition," questioned. *In re* Frith and Osborne - 618

PARTNERSHIP—Dissolution of - - 637
See Evasive Pleading.

—— Shares in bank standing in name of one partner - - - - 481
See Creditor holding Security. 1.

PAST MEMBER—*Contributory—Compulsory Registration—Companies Act*, 1862, *ss.* 209, 196, 38.] An insurance company registered under 7 & 8 Vict. c. 110, was afterwards registered under the *Companies Act*, 1862, pursuant to sect. 209, which obliges such companies so to register themselves "in the manner and subject to the regulations" thereinbefore contained. On the company being wound up, a person who had parted with his shares in the company within a year before the winding-up resisted being placed on the list of contributories as a past member, on the ground that sect. 38, which makes past members liable,

PAST MEMBER—*continued.*
applied in terms only to companies formed under the Act, and that the words in sect. 209 "subject to the regulations hereinbefore contained" did not import it into a case of compulsory registration :—*Held*, that the effect of the Act was to put a company compulsorily registering itself under sect. 209 in the same position as if the registration had been voluntary, and that the 38th section applied to such a company. *In re* EUROPEAN ASSURANCE SOCIETY. RAMSAY'S CASE - - - 388

PATENT—*Construction—Evidence—Foreign Patent—Licensee.*] A licensee of a patented invention was ordered to account for all instruments made by him pursuant to the patent. He alleged that the instruments which he had made were not covered by the patent according to its true construction, and in support of his contention tendered in evidence a prior American specification (a copy of which was in the Library of the Commissioners of Patents, but was not proved to have been known to the patentee) for the purpose of shewing that a construction large enough to cover the instruments made by the licensee would make the patent bad for want of novelty, and therefore ought not to be adopted by the Court :—*Held*, that the evidence was inadmissible.—Order of *Bacon*, V.C., reversed.—*Trotman* v. *Wood* (16 C. B. (N.S.) 479) observed upon. ADIE *v.* CLARK - 134

2. —— *Construction—New Contrivance to effect well-known Object.*] Where the object of a patent is old, and the means to effect it only are new, the Court construes the invention strictly, as it looks jealously at the claims of inventors seeking to limit the rights of the public in effecting a well-known object. In such a patent the words "or any mechanical equivalent," which are often introduced, are wholly useless. CURTIS *v.* PLATT [135, n.

3. —— *Novelty—Prior Publication—Book in Patent Library — Specification — Anticipation — Sufficiency of Description, Tests of—Utility.*] In 1865, letters patent for improvements in the construction of skates were granted to the agent of the alleged inventor, who was resident in *America*, and to whom they were afterwards assigned. Two years previously, an American work containing a brief description of the invention, and five weeks previously, a book of illustrations containing a drawing of it, were sent to the library of the Patent Office in *London* :—*Held*, that the drawing was not so published that it could be referred to on the issue of novelty.—Sufficiency of the specification and of the description relied on as an anticipation considered.—Requisite amount of utility considered. PLIMPTON *v.* MALCOLMSON 531

PAYMENT—Mistake of law - - 351
See MISTAKE OF LAW.

PAYMENT OUT OF COURT—*Fund in Court—Money to be laid out in Land in Settlement—Payment out to Tenant in Tail—Disentailing Deed.*] A fund in Court in a lunacy, the lunatic being dead, represented land in settlement. A deceased tenant in tail had created a base fee :—*Held*, that the fund could not be paid out to the persons claiming through him, except upon the production of a deed enlarging the base fee.—*In re Butler's Will* (Law Rep. 16 Eq. 479) followed. *In re* REYNOLDS - - - - - 61

PAYMENT OUT OF COURT—*continued.*

2. —— *Practice—Lands Clauses Act* (8 *Vict. c.* 18), *s.* 69—*Trustees for Sale—"Party becoming absolutely entitled."*] A fund in Court representing the purchase-money of leaseholds taken by a railway company under the *Lands Clauses Act*, ordered to be paid out to trustees having a power of sale, the *cestui que trust* being an infant. *In re* GOOCH'S ESTATE - - - - 742

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—— Security for costs - - - 62
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—— Liquidation—Costs of petition in bankruptcy - - - - 320
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—— Settled Estates Acts—Persons entitled to petition - - - - 145
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—— Joinder of issue - - - - 254
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—— Holder of—Novation—Amalgamation of companies - - - - 391
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—— Exchange—Partition - - - 618
See Partition.
—— Sale—Mortgage - - - 600
See Power of Sale.

POWER OF SALE—*Mortgage—Proviso as to Inquiry by Purchaser—Exercise of Power after Security is satisfied—Validity of Sale.*] A mortgage contained a power of sale to be exercised by the mortgagee after default, with a proviso that upon any sale purporting to be made in pursuance of the power, the purchaser should not be bound to inquire whether default had been made in payment of any principal or interest, or as to the propriety or expediency of such sale, and that, notwithstanding any impropriety or irregularity in any such sale, the same should, as regarded the protection of the purchaser, be taken to be within the power, and the remedy of the mortgagor should be in damages only. The mortgagee purported to exercise the power in favour of a purchaser for value. In a suit by an incumbrancer of the mortgagor to establish his priority over the mortgagee, it was alleged that if the accounts were taken it would shew that the security was satisfied at the time of the sale:—*Held*, that the sale, having been made to a *bonâ fide* purchaser without notice, was valid, even if the security should prove to have been satisfied. Dicker *v.* Angerstein - - - 600

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See Debenture.

PROBATE—Litigation—Costs - - 218
See Costs in Testamentary Suit.
—— Testamentary paper - - - 269
See Testamentary Paper.

PROBATE COURT JURISDICTION—*Will of Personal Estate—Fraud—Exclusive Jurisdiction of Court of Probate.*] A testator made a will giving all his property to his wife, and appointing her sole executrix. She proved the will. The heir-at-law and sole next of kin filed a bill to have her declared a trustee of the property for him, on the ground that she had fraudulently concealed from the testator the fact that she was not his lawful wife, as she had a former husband living:—*Held*, that the Court of Chancery had no jurisdiction to entertain the case, which was within the exclusive jurisdiction of the Court of Probate; and that the case was not distinguished from *Allen* v. *M'Pherson* (1 H. L. C. 191) by the fact that the lady had not asked the testator to make a will in her favour. Meluish *v.* Milton - - 27

PROFESSIONAL NURSE—Trader—Bankruptcy
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PROFITS—Loss of—Compensation under Lands Clauses Act - - - - 36
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PROMOTERS OF COMPANY—Contract with—Omission in prospectus - - 722
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PROOF—Bankruptcy—Allowance of discount 803
See Discount. 2.
—— Bankruptcy—Creditor holding security 481, [488
See Creditor holding Security. 1, 2.
—— Bankruptcy—Damages in tort - 491
See Proof for Damages.

PROOF FOR DAMAGES—*Proveable Debt—Damages in Action of Tort—Verdict before, but Judgment not signed till after, Adjudication—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 31.] Damages recovered in an action of tort are not, under sect. 31 of the *Bankruptcy Act*, 1869, proveable in the bankruptcy of the Defendant,

PROOF FOR DAMAGES—*continued.*
unless judgment is signed before the adjudication. —If judgment is not signed till after the adjudication, even though the verdict was obtained before, the bankrupt is not discharged from the liability.—*Ex parte Peacock* (Law Rep. 8 Ch. 682) distinguished. *In re* Newman. *Ex parte* Brooke **494**

PROSPECTUS—Misrepresentation - - **722**
See Misrepresentation in Prospectus.

PROTECTED DEALING WITH BANKRUPT—*Relation back of Title of Trustee in Bankruptcy—Dealing in Good Faith and for Valuable Consideration without Notice of Act of Bankruptcy—Notice of Intention to commit Act of Bankruptcy—Order and Disposition of Bankrupt—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 15 (*sub-s.* 5), 94 (*sub-s.* 3)—12 & 13 *Vict. c.* 106, *s.* 133.] The meaning of sect. 94 (sub-sect. 3) of the *Bankruptcy Act*, 1869, is in effect the same as that of sect. 133 of the *Bankruptcy Act*, 1849.—A creditor who receives notice of his debtor's intention to commit an act of bankruptcy is not bound to inquire whether the act has been committed, but is entitled to avail himself of his remedies just as if he had received no such notice.—The holder of a bill of sale, given to secure a debt, received notice on the 10th of March from the debtor's solicitor that the debtor was about to file a liquidation petition. The creditor at once sent a man to demand payment of the debt, and to take possession of the property comprised in the bill of sale if payment was not made. Possession was obtained on the 11th of March. The petition had been filed on the 10th of March, but neither the creditor nor the man who was sent to take possession knew this until after possession had been obtained:—*Held*, that the taking possession of the property was a dealing with the debtor for valuable consideration which was protected by sect. 94, sub-sect. 3, of the *Bankruptcy Act*, 1869; that it took the goods out of the order and disposition of the bankrupt notwithstanding the prior act of bankruptcy; and that the creditor was entitled to retain the property as against the trustee under the liquidation.—Decision of *Bacon*, C.J., reversed. *In re* Wright. *Ex parte* Arnold - - **70**

PROTECTOR OF SETTLEMENT—Lunatic—Advowson - - - - **59**
See Lunatic Protector of Settlement.

PROVISO—Power of sale—Purchaser not bound to make inquiries - - - **600**
See Power of Sale.

PUBLIC HEALTH ACTS—*Company incorporated by Act of Parliament—Delegation of Powers—Illegal Agreement—Public Health Act*, 1875, *s.* 52—*Company able and willing to supply Water.*] A waterworks company is not, within the meaning of the 52nd section of the *Public Health Act*, 1875, able and willing "to supply water within the district of a local authority," unless it has both the necessary powers and the requisite supply of water.—Where company *R.* had the necessary powers but no water, and company *S.* had the requisite supply of water but no powers within the district, and company *R.* sold its plant to company *S.*, and certain members of company *S.* bought all the shares in company *R.* with the intention of allowing company *S.* to exercise the powers of company *R.*:—*Held*, that the powers could not be so delegated, and that neither company was "able and willing" within the meaning of the Act, and consequently that neither was entitled to notice under the 75th section of the *Public Health Act*, 1848, or the 52nd section of the *Public Health Act*, 1875.—Section 75 of the *Public Health Act*, 1848 (11 & 12 Vict. c. 63), is not materially extended by sect. 52 of the *Public Health Act*, 1875 (38 & 39 Vict. c. 55), and therefore a local authority, desiring to construct waterworks, and having, before the passing of the latter Act, given the notices required by sect. 75 of the former Act, is not, in consequence of the passing of the latter Act, required to give the notices under sect. 52 of that Act. Richmond Waterworks Company and the Southwark and Vauxhall Waterworks Company *v.* Vestry of Richmond (Surrey) - - - **82**

PUBLIC MEETING—Law of—Vote by ballot **233**
See Advowson. 1.

PURCHASE-MONEY—Lands Clauses Act—Reinvestment - - - **262, 289**
See Reinvestment of Purchase-money.

PURCHASE OF LIFE ANNUITY—*Conditional Limitation—Restraint on Alienation.*] A testator directed his trustees to purchase out of his residuary estate from Government an annuity for *M.*, a single woman, who was not to be entitled to elect to receive the price or value of the annuity in lieu thereof, and he directed such annuity to be paid to her for her separate use, and that if she should at any time sell, assign, incumber, or in anywise dispose of or anticipate such annuity, or any part thereof, the same should cease and be void, and should sink into the residue:—*Held*, that *M.* was not entitled to the value of the annuity, but that the annuity was to be purchased by the trustees, and held by them to pay to *M.* until she should do any act of alienation. Hatton *v.* May [148

2. —— *Gift to Trustees—Direction to purchase an Annuity in the name of and for Annuitant—Proviso against selling Annuity—Residuary Estate—Contract for Sale of Annuity.*] Testatrix gave a sum of £20,000 stock to be laid out by the trustees of her will in the purchase of a government annuity in the name of and for the benefit of her godson for the term of his natural life; and directed that the annuitant should not be entitled to have the value of his annuity in lieu thereof, and that if he should sell his annuity the same should cease and form part of her residuary estate. The trustees purchased an annuity in the name, and payable during the life, of the annuitant, and he entered into a contract to sell the same:—*Held*, that the annuitant was absolutely entitled to the annuity, and that he could make a good title to it to the purchaser. Hunt-Foulston *v.* Furber - - - - - **235**

PURCHASER—Notice of covenant - - **694**
See Covenant running with Land.

QUALIFICATION—Director - - **661**
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REAL ESTATE—Charge of legacies on - **630**
See Charge of Legacies.

REAL ESTATE—*continued.*
—— Devise of—Leaseholds - - - 763
See Devise of Real Estate.

REBUILDING MANSION-HOUSE - - 743
See Accumulations.

RECTIFICATION OF SETTLEMENT — *Petition under Trustees Relief Act.*] By a marriage settlement the wife's interest in real estate was granted and assigned to trustees, their executors, administrators, and assigns, upon the usual trusts in a settlement, with the omission of the word "heirs" in every case in which the fee simple was evidently intended to be passed:—*Held*, upon petition under the *Trustees Relief Act*, that the deed must be rectified by the insertion of the word "heirs," in order to effect the intention of the parties. *In re* Bird's Trusts - - 214

REGISTRATION—Bill of sale - - 324
See Registration of Bill of Sale.
—— Company—Compulsory - - 388
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—— Mortgage by company - - - 669
See Unregistered Mortgage.

REGISTRATION OF BILL OF SALE—*First Bill of Sale not registered—Second Bill of Sale of same Property registered—Bankruptcy of Mortgagor—Rights of Trustee—Bills of Sale Act*, 1854, *s.* 1.] A bill of sale of chattels was executed, but was not registered. The mortgagor executed a second bill of sale of the same chattels to another person, which was registered. Afterwards the mortgagor filed a liquidation petition:—*Held*, that the second mortgagee was entitled to such of the chattels as had not been seized before the liquidation by the first mortgagee. *In re* Barrand. *Ex parte* Cochrane - - - - - 324

REINVESTMENT OF PURCHASE-MONEY — *Lands Clauses Act — Application of Purchase-money — Lateral Permanent Improvements — Enlargement of Dwelling-house.*] Purchase-money of part of a settled estate paid in under the *Lands Clauses Consolidation Act* ordered to be applied towards the cost of lateral additions to a house, part of the settled estate. *In re* Speer's Trusts [262

2. —— *Lands Clauses Consolidation Act*, 1845, *s.* 69—*Money paid into Court by Railway Company for Corporation Lands—Mortgages and Bonds of Corporation affecting their Lands*—5 & 6 *Will.* 4, *c.* 76, *ss.* 92, 94—9 & 10 *Vict. c.* 74, *s.* 21.] Money paid into Court under sect. 69 of the *Lands Clauses Consolidation Act*, 1845, by a railway company, for the purchase of lands belonging to the corporation of *Derby*, was ordered to be applied in the payment off of mortgages of certain tolls and of bonds which had been given by the corporation for moneys borrowed under the provisions of the 9 & 10 Vict. c. 74, s. 21, and were payable out of the borough fund, which fund was largely composed of the rents and profits of the real estates of the corporation. *In re* Derby Municipal Estates - - - - 289

RELEASE OF TRUSTEE IN LIQUIDATION 115
See Bankruptcy Jurisdiction. 1.

REMAINDER—Acceleration of - - 703
See Acceleration of Remainder.

REMAINDER—*continued.*
—— Particular fund—General residue - 703
See Residuary Gift.

REMOTENESS OF LIMITATION—*Appointment—General Devise—Trust Estates.*] By marriage settlement, dated in 1821, real estate was conveyed to trustees to the use of the settlor, *W. M.*, for life, and after his death to the use of all or any exclusively, of the children, grandchildren, or other issue of *W. M.* (to be born before the appointment was made), as he should by deed or will appoint, and in default, to the uses therein declared. By will, dated in 1867, *W. M.* appointed the estate to his son *W. E. M.* in fee, but in case he should have no child who should attain twenty-one, then to the settlor's grandson *W. M. B.* in fee:—*Held*, that the executory gift over to *W. M. B.* was void for remoteness. *In re* Brown and Sibly's Contract - - - - 156

2. —— *Will—Perpetuity—Annuity or Absolute Interest.*] A testator gave to *A. B.* an annuity of £50 per annum for her life, and after her decease to the children she might have, born in wedlock, equally to be divided between them during their lives, and after the decease of the survivor, to go to his nephew and his two nieces equally between them. *A. B.* having died without issue:—*Held*, that the gift to the nephew and nieces was not void for remoteness, and that they took the capital from whence the annuity proceeded absolutely, in equal shares as tenants in common. Evans *v.* Walker - - 211

3. —— *Will—Rule against Perpetuities—Gift to Class consisting of Children and Grandchildren who attain Twenty-four—Severance of Shares.*] A testator gave his real and personal estate to trustees upon trust for his wife during widowhood, and after her death or second marriage for his children who might be living at such death or second marriage, and the issue of any child who might have previously died, such issue to take the share of her or of his deceased parent in equal shares, the shares of such of his children or grandchildren as should be a son or sons to become vested in and payable to them as and when he or they should respectively attain the age of twenty-four years, and the shares of his daughters, or the female issue of any deceased child, to be settled as therein mentioned:—*Held*, that the whole of the gifts after the life interest of the widow were void for remoteness.—*In re Moseley's Trusts* (Law Rep. 11 Eq. 499) disapproved of. Hale *v.* Hale - 643

RENT—Interim—Executory limitation - 374
See Executory Limitation.

REPLY—Form of - - - - 254
See Joinder of Issue.

REPUTED OWNERSHIP - - - 795
See Order and Disposition.

RESIDUARY DEVISE—Pecuniary legacy—Marshalling - - - - 109
See Marshalling.

RESIDUARY GIFT — *Will — Construction — Remainder—Meaning restricted by Context.*] A testator, after disposing specifically of most of his property, enumerated certain funds out of which he directed that his debts, funeral and testamentary expenses, should be paid, and added: "The

RESIDUARY GIFT—*continued.*
remainder to be equally divided to my surviving children." The frame of the will left it doubtful whether these words were intended to apply generally or only to the residue of the particular funds:—*Held*, that, considering the general frame of the will, only what was left of the particular funds passed. JULL *v.* JACOBS - - 703

—— Real and personal estate—Charge of legacies - - - - - 630
See CHARGE OF LEGACIES.

RESOLUTION FOR COMPOSITION — Execution creditor - - - 113, 488
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RESOLUTION FOR LIQUIDATION—*Form of—Composition—Action by Creditor not included in Debtor's Statement—Injunction—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 126—*Bankruptcy Rules*, 1870, *r.* 289.] The creditors of a debtor who had filed a liquidation petition resolved that his affairs should be liquidated by arrangement, and appointed a trustee; that, on payment by the debtor to the trustee of a sum equal to 1*s.* in the pound on the amount of the debts, he should be entitled to have his discharge; and that the payment should be made by three instalments of 4*d.* in the pound, at six, twelve, and eighteen months from the registration of the resolutions. No second meeting was summoned to confirm these resolutions, but they were registered:—*Held*, that the arrangement was, in substance, a composition; that it amounted to an evasion of the provisions of section 126 of the *Bankruptcy Act*, 1869, and that the resolutions ought not to have been registered. —After the registration a creditor, who was not included in the debtor's statement of affairs, and who had no notice of the proceedings, brought an action against the debtor for money had and received, and also in detinue:—*Held*, that, so far as the action was founded on the count in detinue, it was an action in tort, and that the Court had no power to restrain it, and that in other respects the Court, in the exercise of the discretion given by rule 289 of the Bankruptcy Rules, 1870, ought not to restrain the action. *In re* MEADE. *Ex parte* HAROLD - - - - - 119

2. —— *Bankruptcy—Appointment of Trustee more than Six Months after the Filing of Petition.*] A debtor who traded both in *London* and *Scotland*, presented a petition for liquidation in *England* on the 12th of July. The first meeting of his creditors was held, but was adjourned without passing any resolution till the 10th of February, in order to await the result of certain proceedings in *Scotland*. The English creditors met on the 10th of February and passed a resolution for liquidation and appointed a trustee:—*Held*, that the appointment of the trustee, being more than six months after the filing of the petition, was void, and that the Registrar was right in refusing to register the resolution. *Ex parte* FENNING. *In re* WILSON & ARMSTRONG - 455

RESTRAINT OF TRADE—*Injunction—Covenant by Lessor of Stall in a Public Building that Lessee shall have exclusive Right of Sale of specified Goods.*] Where the Defendants, owners of a public building, have contracted with the Plaintiff, that he, renting a stall from them, shall have the exclusive right to exhibit and sell certain specified classes of goods, an injunction will lie against the Defendants for permitting the exhibition and sale by other renters of stalls within the building of goods so specified. ALTMAN *v.* ROYAL AQUARIUM SOCIETY - - - - - 228

RESTRAINT OF TRADE—*continued.*

RESTRAINT ON ALIENATION—Annuity—Right of annuitant to value - 148, 245
See PURCHASE OF LIFE ANNUITY. 1, 2.

REVERSION—Contingent - - - 767
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REVERSIONARY CHARGE—Succession duty
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RULES OF SUPREME COURT, 1875, Order II., r. 4 - - - - - 275
See SERVICE OUT OF JURISDICTION.

—— **Order XI., r. 1** - - - - 275
See SERVICE OUT OF JURISDICTION.

—— **Order XIII., r. 9** - - - 516
See SUBSTITUTED SERVICE. 2.

—— **Order XVI., r. 2** - - - - 277
See AMENDMENT OF PLEADINGS.

—— —— **rr. 4, 13** - - - - 359
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—— —— **rr. 1, 8, 9** - - - - 359
See MULTIFARIOUSNESS.

—— **Order XIX., rr. 2, 4, 14** - - 254
See JOINDER OF ISSUE.

—— —— **r. 6** - - - - 516
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—— —— **rr. 17, 20, 72** - - - 637
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—— **Order XXIV., r. 1** - - - 793
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—— —— **rr. 2, 3** - - - - 254
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—— **Order XXVII., r. 1** - - - 106
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—— —— **r. 12** - - - - 254
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—— **Order XXXI., r. 1** - - - 288
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—— **Order XXXIII.** - - - - 106
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—— **Order XL., rr. 10, 11** - - - 106
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—— —— **r. 11** - - - - - 793
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—— **Order XLII., rr. 9, 12** - - - 276
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—— Succession duty - - - - 675
See Succession Duty.

SATISFACTION—*Bequest by Trustee to Cestui que Trust—Tenant for Life.*] A testator who had two sums of £1000 and £500 in his hands upon trust for his sisters *E.* and *A.* respectively for life, for their separate use, and after their deaths for their children equally, by his will desired that his real estate should be sold, and that two sums of £1000 and £500 should be paid to his sisters out of the proceeds of sale, and desired that the remainder of the proceeds of sale might be equally divided amongst other persons named:—*Held*, that the gifts to the sisters were not a satisfaction of the moneys held by testator as trustee for his sisters and their children. Fairer *v.* Park 309

2. —— *Covenant in Settlement.*] *C. W.*, in a settlement on the marriage of his daughter *L.*, covenanted to pay the trustees, on her decease, £1000, to be in trust for *L.* for life, then for her husband for life, with the usual trusts for her children. By her will *C. W.* settled £1000 upon trusts similar to those of *L.'s* settlement, omitting her husband's life interest:—*Held*, that this was a case of satisfaction, and that neither *L.* nor her children took anything additional under the will unless *L.'s* husband survived her. Mayd *v.* Field [587

SATISFACTION—*continued.*

3. —— *Covenant in Settlement—Annuity—Interest.*] Lord *W.*, on the marriage of his son, covenanted that he would, by his will, direct his executors to invest £10,000 in trust for his son's wife for life for her separate use, with remainder to her children. By his will Lord *W.* directed his trustees to pay an annuity of £2000 for five years to his son's wife for life for her separate use, and at the end of five years to his son's wife and children upon the trusts of their marriage settlement:—*Held*, that the sum of £10,000 given by the will was not a satisfaction of the sum payable under the covenant; but that the annuity of £2000 was a satisfaction of the interest of the sum payable under the covenant, and must abate to that extent. Bethell *v.* Abraham - 590, n.

—— Dower - - - - - - 714
See Dower.

—— Security—Power of sale in mortgage 600
See Power of Sale.

SCHEME OF ARRANGEMENT—*Surety—Acceptor of Accommodation Bills—Debentures issued to Creditors—Bankruptcy Act*, 1869, *s.* 28.] The creditors of a firm of liquidating debtors agreed to a scheme of arrangement under the 28th section of the *Bankruptcy Act*, 1869, which was sanctioned by the Court. Under this scheme the assets were transferred to a company, who were to carry on the business, and debentures were issued to the creditors for the amount of their proved debts, which were to be payable out of the surplus profits, after meeting certain prior charges. Among the creditors was *C.*, who had accepted accommodations bills to a large amount for the firm, and who afterwards himself filed a liquidation petition, and paid his creditors a composition of 4*s.* in the pound. The holders of the bills thus accepted proved against *C.'s* estate, and received their composition, amounting altogether to about £32,000. They also proved against the estate of the liquidating firm under the scheme of arrangement. Some of them received the composition before proving, and consequently only proved for 16*s.* in the pound; the others proved for the whole amount. *C.* then claimed to stand in the place of the bill-holders as a creditor of the liquidating firm to the extent of what he had paid under the composition, and to have debentures issued to him to the nominal amount of £32,000 in their stead. His claim to stand in the place of those bill-holders who had received their composition before proving under the scheme of arrangement to the extent of 4*s.* in the pound was allowed; but as to the others who had proved for the whole amount:—*Held*, first, that the debentures were not issued to the creditors in satisfaction of their debts, but in substitution for the dividends which under a bankruptcy would have been payable on them: Secondly, that the scheme of arrangement made no difference in the relation between *C.* and the liquidating firm, namely, that of surety and principal debtor, and therefore that he had no equity to receive anything out of these assets till the creditors had been actually paid 20*s.* in the pound. His claim to debentures in respect of that part of composition was consequently disallowed. *Ex parte* Turquand. *In re* Fothergill - - 445

SECURED CREDITOR—Proof in bankruptcy 481, [488
See CREDITOR HOLDING SECURITY. 1, 2.

SECURITY—Value of—Deduction from proof 488
See CREDITOR HOLDING SECURITY. 2.

SECURITY FOR COSTS—*Pending Suit—Rules of Court, February,* 1876, *Order* LV., *r.* 2.] Order LV. of Rules of Court, February, 1876, applies to suits commenced before November, 1875.—In a suit by a foreign government £120 security for costs had been given before the Judicature Acts came into operation. A large amount of costs would be incurred before the suit was heard, and further security to the amount of £500 to cover future costs was, under Order LV. of the Rules of Court, February, 1876, ordered to be given.—Order of *Malins*, V.C., reversed. REPUBLIC OF COSTA RICA *v.* ERLANGER - - - - - - 62

SEPARATE ESTATE OF WIFE—*Liability for General Engagements—Appointment by Will—Cumulative or Substitutional.*] Personal property settled on the marriage of *C. W.* in trust as she should during coverture by deed or will appoint, and, subject thereto, for her separate use for life, and if she survived her husband (which happened) for her absolutely:—*Held*, to be bound by her general engagements.—Accordingly, *C. W.* having in a settlement on the marriage of her daughter *L.* covenanted with the trustees thereof for the payment to them on her decease of £1000 to be in trust for *L.* for life, then for the husband of *L.* for life, then upon the usual trusts for her children:—*Held*, that the trustees of *L.'s* settlement were entitled, on the death of *C. W.*, to stand in the position of creditors in respect of the property comprised in the first settlement.—By the will of *C. W.* executed under the power of the first settlement, £1000 was settled upon trusts similar to those of *L.'s* settlement, omitting the husband's life interest:—*Held*, that this was a case of satisfaction, and that neither *L.* nor her children took anything additional under the will unless *L.'s* husband survived her:—*Held*, also, that dividends received by *C. W.* after her husband's death, and railway stock representing part of her settled property which was realized after her husband's death, did not pass under her testamentary appointment. MAYD *v.* FIELD - - - - 587

—— Disposition by will - - - 194
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SEPARATE USE—Annuity—Right of annuitant to value - - - - - 148
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SERVICE—Debtor's summons - - 498
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—— Injunction—By post - - - 113
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—— Out of jurisdiction - - - 275
See SERVICE OUT OF JURISDICTION.

—— Substituted - - - 512, 516
See SUBSTITUTED SERVICE. 1, 2.

SERVICE OUT OF JURISDICTION—*Practice—Judicature Acts—Leave to proceed to sign Judgment—Rules of Court,* 1875, *Order* II., *r.* 4; *Order* XI., *r.* 1—*Writ of Summons—Appendix A., Part* 1, *Forms* 2 *and* 3.] Where leave is given to issue a writ for service out of the jurisdiction, the words

SERVICE OUT OF JURISDICTION—*continued.*
"by leave of the Court or a Judge," which occur in Forms 2 and 3 given in the Rules of Court, 1875, Appendix A., part 1, may be omitted from the writ and notice, so as to enable the Plaintiff to proceed, in default of appearance, without obtaining further leave of the Court or a Judge before so doing.—*Scott* v. *Royal Wax Candle Company* (1 Q. B. D. 404) followed. BACON *v.* TURNER - - - - - - 275

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SETTLED ESTATES ACTS—19 *&* 20 *Vict. c.* 120, *s.* 16; 37 *&* 38 *Vict. c.* 33, *s.* 3—*Lease—Concurrence—Trustee.*] The Court, on the peculiar construction of a will, and having regard to the peculiar nature of the property, refused to authorize a lease dispensing with the concurrence of a person who was a trustee and also beneficially interested.—Observations on the construction of the *Settled Estates Act*, s. 16, as to the persons entitled to petition.—Order of the Master of the Rolls affirmed. TAYLOR *v.* TAYLOR - - 145

2. —— 19 *&* 20 *Vict. c.* 120, *s.* 17—*Trust for Sale—Consent by Beneficiaries to Sale.*] Where property was vested in a trustee upon trust after the death of the tenant for life to sell and divide the proceeds among numerous persons who would become absolutely entitled, with power to the trustee to give receipts,—on a petition by the tenant for life, under the *Settled Estates Act*, for a sale of the property:—*Held*, that under sect. 17 of the Act the consent of all the beneficiaries was necessary. *In re* IVES. BAILEY *v.* HOLMES 690

SETTLEMENT—Confirmed by will - 269
See TESTAMENTARY PAPER.

—— Covenant to settle after-acquired property
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SOIL—Removal of minerals—Right of lord and copyholder - - - - - 826
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SOLICITOR—Lien - - - - 317
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—— Service of debtor's summons — Country agent - - - - 498
See DEBTOR'S SUMMONS.

SOLICITOR'S LIEN—*Title-Deeds held for Mortgagor and Mortgagee—Bankruptcy of Mortgagor—Sale of Equity of Redemption by Trustee—Right of Soli-*

SOLICITOR'S LIEN—*continued.*
citor to retain Costs out of Purchase-Money.] A solicitor was instructed to prepare a mortgage, and the title-deeds of the property were deposited with him for this purpose by the mortgagor. He was also acting as solicitor for the mortgagee, and when the mortgage was executed he continued to hold the deeds on behalf of the mortgagee. The mortgagor filed a liquidation petition, and the solicitor was employed on behalf of the trustee. The trustee sold the equity of redemption, and the solicitor received the purchase-money:—*Held* (reversing the decision of the County Court Judge), that the solicitor had a lien on the deeds against the mortgagor, and was entitled to retain out of the purchase-money the amount of costs due to him from the mortgagor. *In re* MESSENGER. *Ex parte* CALVERT - - - - 317

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38 & 39 Vict. c. 91, s. 10—*Trade-marks* 659
See TRADE-MARK. 2.

STAYING PROCEEDINGS — *Winding-up — Proceedings by Creditor—Irish Court—Injunction—Jurisdiction—Companies Act*, 1862, *ss.* 87, 122.] The Court has jurisdiction, under sect. 87 of the *Companies Act*, 1862, after a winding-up order has been made, to restrain any "suit, action, or other proceeding" against the company in any part of the *United Kingdom*, and has power under sect. 122 of the Act to enforce such order when made.—Accordingly, when a company with a registered office in *London*, and carrying on business in *Ireland*, had been ordered to be wound up, and proceedings were commenced against it in the Irish Courts by a creditor of the company:—*Held*, that the Court had power to restrain such proceedings; and injunction accordingly. *In re* INTERNATIONAL PULP AND PAPER COMPANY - 594

2. —— *Voluntary Winding-up — Action by Shareholder.*] After resolutions had been passed and confirmed for the voluntary winding-up of a company, a shareholder, in ignorance thereof, commenced an action against the company and the directors to have his name removed from the register, for a rescission of his contract to take shares, on the ground of misrepresentations in the prospectus, and to obtain repayment of all moneys already paid, and an indemnity against future liability in respect of his shares:—*Held*, that the relief asked in the action was not inconsistent with the winding-up; and a motion by the voluntary liquidator to stay all further proceedings in the action was refused with costs. HALL *v.* OLD TALARGOCH LEAD MINING COMPANY - 749

STRIKING OUT PLEADINGS—*Rules of Court*, 1875, *Order* XXVII., *r.* 1.] The whole of a statement of claim, parts of which are unintelligible, other parts of which are irrelevant, and other parts of which contain offensive charges against the Defendants, may be struck out under Order XXVII, rule 1, of the Rules of Court, 1875.—Order of *Bacon*, V.C., affirmed by *James*, L.J., and *Mellish*, L.J.; *Baggallay*, J.A., doubting. CASHIN *v.* CRADOCK - - - - - 376

2. —— *Appeal—Discretion—Rules of Court*, 1875, *Order* XXVII., *r.* 1.] Where pleadings are such as should be struck out, they ought to be struck out by the Judge, and not left to be dealt with as a question of costs; but where the Judge of the Court below has exercised his discretion on the subject, the Court of Appeal will not interfere, unless he has acted on a wrong principle.—Charges and statements which would not have been improper under the former system may nevertheless be struck out under the Judicature Acts. WATSON *v.* RODWELL - - - 380

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SUBPŒNA—Witness before arbitrator—Liquidation - - - - - - 125
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SUBSTITUTED SERVICE—*Practice—Indorsement of Writ—Default of Appearance and Pleading—Motion for Judgment—Delivery of Notice by filing—Rules of Court*, 1875, *Order* XIII., *r.* 9; XIX., *rr.* 6, 13 XXIX., *r.* 10; LIII., *r.* 3.] *Held*, by the Master of the Rolls, that a notice of motion for judgment is a document which may be delivered, in case a Defendant does not appear, by filing it with the proper officer pursuant to Rules of Court, 1875, Order XIX., rule 6:—*Held*, by Court of Appeal (reversing *Jessel*, M.R.), that Order IX., rule 13, as to indorsing date of service on writ does not apply to cases of substituted service. DYMOND *v.* CROFT - - - - - - - 512

2. —— *Practice — Default of Appearance—Service by filing with Proper Officer—Rules of Court*, 1875, *Order* XIX., *r.* 6.] A notice of motion for judgment is a document which may be delivered by filing it with the proper officer, under Order XIX., rule 6, as against a Defendant who has not appeared in the action. MORTON *v.* MILLER - - - - - - 516

SUCCESSION DUTY—*Bonâ fide Sale—Reversionary Charge—Succession Duty Act* (16 & 17 *Vict. c.* 51), *ss.* 2, 7, 17.] A conveyance or assignment by way of *bonâ fide* sale does not create a succession within the meaning of the *Succession Duty Act* (16 & 17 Vict. c. 51).—Where the purchaser of a reversionary life interest in settled property had contracted to sell it to *D.*, the tenant for life in possession, in consideration of a sum of money paid down and a further sum payable on the death of *D.*, secured by a charge on the reversion:—*Held*, that there was no "succession" created within the meaning of sect. 2 of the Act, and that no duty would be payable on the death of *D.* in respect of the said charge.—The effect of the exceptions in sects. 7 and 17 of the Act considered. FREYER *v.* MORLAND - - 675

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See EXAMINATION OF LIQUIDATING DEBTOR.

SUPPLEMENTAL PROCEEDING—*Action—Practice—Numerous Parties—Representation by Defendant—Enforcing Judgment against Party represented—Binding Judgment.*] A suit was instituted in the Court of Chancery by Plaintiffs on behalf of themselves and all other occupiers of lands and tenements within *Epping Forest*, against, amongst others, the lord of a manor within that forest and two grantees from that lord of part of the wastes of the manor. The Plaintiffs claimed to be entitled to rights of common over the wastes of the manor, and alleged that the lord of the manor in question inclosed or authorized the inclosure of large portions of the waste, so as to interfere with the rights of common, and had granted other portions of the waste to persons who made similar inclosures, and that such persons were too numerous to be made parties to the suit, but were sufficiently represented by the two grantees made Defendants thereto. A decree was made establishing the right of common claimed, and granting an injunc-

SUPPLEMENTAL PROCEEDING—*continued.*
tion. After the Judicature Acts came into operation the same Plaintiffs filed a supplemental statement of claim against another grantee from the same lord, seeking to have the benefit of the decree against him, and an injunction:—*Held*, on demurrer, that the Defendant was bound by the decree in the suit, so that he could not litigate the right of common thereby established:—*Held*, also, that the proceedings for enforcing the decree against him were not purely supplemental, but in the nature of original proceedings. Commissioners of Sewers of the City of London *v.* Gellatly - - - - - - 610

SURETY—Bankruptcy—Scheme of arrangement
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TENANT FOR LIFE—Renewable leasehold—Enjoyment in specie - - - 327
See Enjoyment in Specie.

TENANT IN TAIL—Fund representing settled land - - - - - 61
See Payment out of Court. 1.

TESTAMENTARY PAPER—*Incomplete Settlement—Confirmation by Will—Effect of—Non-admission of Settlement to Probate.*] Where a settlement, incomplete as to part of the property comprised in it, is subsequently confirmed by the will of the settlor, the confirmation perfects the settlement, but as a testamentary instrument, so that the doctrines of ademption and lapse apply.—*R. H.*, by a voluntary settlement, assigned to trustees several mortgage debts, certain shares in a bank, and some furniture, and directed the trustees to hold the premises and certain consols which had been previously transferred to them, upon trust for herself for life, and then, as to part of the trust premises, for specified beneficiaries; and as to the residue, for *M. F.*—*M. F.* died in the lifetime of the settlor, who in her lifetime received some of the mortgage debts (the others being received by the trustees), and died without having duly transferred the bank shares, but having by her will confirmed the settlement. The settlement being valid as to the consols, the mortgage debts received by the trustees, and the furniture, but incomplete as to the mortgage debts received by the settlor, and the bank shares:—*Held*, that the confirmation could not operate as to the mortgage debts received by the settlor; but that, notwithstanding that the settlement had not been admitted to probate, the confirmation of it by the will, which had been proved, perfected the settlement with regard to the bank shares as a testamentary instrument, and operated as a specific bequest of them; and that the shares therein of *cestuis que trust* under the settlement, who predeceased the settlor, lapsed in favour of the residuary legatee under this will.—Observations on *Sheldon* v. *Sheldon* (8 Jur. 877). Bizzey *v.* Flight - - - - - - 269

TIME—For appealing—Refusal of interlocutory order - - - - 127
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TITLE—Conditions of sale—Discovery of flaw *aliunde* - - - - 779
See Conditions of Sale.

—— Deeds—Solicitor's lien - - - 317
See Solicitor's Lien.

TRADE-MARK—*Injunction.*] The Plaintiff, a cigar merchant in *London*, registered a label at *Stationers' Hall*, which he requested *G.*, the manufacturer at *Havannah* who supplied him with cigars of a particular description, to affix to each box consigned to him. *G.* accordingly affixed the label, with his own name as manufacturer, to all boxes so consigned. The Plaintiff subsequently discovered that *G.* was supplying cigars of the same description, and with the same label, to the Defendants, who were *G.'s* agents, and brought his action to restrain the alleged infringement of his trade-mark. On a motion for an injunction against the Defendants:—*Held*, that, there being no evidence of any contract that *G.* should supply the Plaintiff exclusively with that description of cigars, the Court could not, on an interlocutory application, restrain the Defendants from using the label. Hirsch *v.* Jonas 584

2. —— *Word—Trade Marks Registration Act* (38 & 39 *Vict. c.* 91), *s.* 10.] A word or distinctive combination of letters is not "a distinctive device, mark, or heading" within the meaning of sect. 10 of the *Trade Marks Registration Act*, 1875 (38 & 39 Vict. c. 91), and cannot be registered as a trade-mark under the Act. *Ex parte* Stephens [659

TRADER—*Bankruptcy—Keeper of a Lodging and Boarding House — Professional Nurse — Bankruptcy Act*, 1869, *sched.* 1.] A professional nurse, who kept a lodging house for invalids and supplied them with board at a profit, as well as lodging and nursing:—*Held*, to be a keeper of an "hotel," and therefore a trader within the *Bankruptcy Act*, 1869. *Ex parte* Thorne. *In re* Jones - 457

TRANSFER OF SHARES—Inrolment - 10, 21
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TRIAL BY JURY—*Action in Chancery Division—Discretion of Judge—Rules of Court*, 1875, *Order xxxvi., rr.* 3, 4, 26.] In actions which before the coming into operation of the Judicature Acts could only have been brought as suits in the Court of Chancery, the High Court has now the same discretion as the Court of Chancery formerly had, whether there shall be a trial by jury. The parties have in such cases no absolute right to a trial by jury. Swindell *v.* Birmingham Syndicate - - - - - - 127

TRUST—Breach of lien for - - - 508
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—— Personalty on same trusts as land - 743
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—— Liability for calls—Shares belonging to testator - - - - - 752
See Liability for Calls.
—— Mortgage—Trustee Act - - 209
See Trustee Acts. 2.

TRUSTEE ACTS—*Practice—New Trustees—Lunatic—Chancery.*] A petition under the *Trustee Acts*, 1850 and 1852, for the appointment of new trustees in the place of trustees, two of whom were dead, and one of the surviving two was a person of unsound mind but not so found by inquisition (not asking for a vesting order), may be presented in Chancery and not in Lunacy. *In re* Vickers' Trusts - - - - 112

2. —— *Trustee Act*, 1850, *ss.* 2, 10—*Joint Mortgage—Outstanding Legal Estate—Former Trustee.*] One of three joint mortgagees, who were trustees, went abroad, and in his absence the mortgage was paid off, and by a deed, to which he, with the other trustees, was named a party, but which he never executed, the debt and security, except the legal estate outstanding in him, were vested in the transferee of the mortgage. Afterwards a new trustee was by deed appointed a trustee in his place:—*Held*, that the neglect or refusal of the old trustee to convey the outstanding legal estate brought the case within the Trustee Acts, and that the Court had jurisdiction under those Acts to vest in the transferee the outstanding legal estate.—*In re Osborn's Mortgage Trusts* (Law Rep. 12 Eq. 392) distinguished. *In re* Walker's Mortgage Trusts - 209

3. —— *Bequest to an Infant—Trusts for Maintenance, Education, and Accumulation—Investment in Consols in names of Executors and Infant—Death of Executors—Trustee Act*, 1850, *and Trustee Extension Act*, 1852—*Infant "Trustee" of the Consols.*] Testator bequeathed a legacy to each child, and directed his executors to stand possessed of his residuary estate in trust for all his children, the shares of those under age to be invested in consols, and paid to them at twenty-one or marriage. There were trusts for maintenance, education, and accumulation for the benefit of the infants. The executors invested the legacies and shares of two of the infants in consols in their own and the infants' names, and died leaving the infants surviving:—*Held*, that the definition of "trustee" in the *Trustee Act*, 1850, sect. 2, included the case of consols which had been transferred into the name of an infant who was the sole beneficial owner of them, but subject to a direction in regard to maintenance or otherwise, vested in somebody else, and which direction could not in this case be practically performed so long as the consols remained in the name of the infant; and *ordered* that the infants be treated as trustees of the consols; and the legal personal representative of the last surviving trustee under the will was appointed to transfer the consols into Court. Gardner *v.* Cowles - - 304

TRUSTEE ACTS—*continued.*

TRUSTEE RELIEF ACT—Rectification of settlement - - - - - 214
See Rectification of Settlement.

UNDISCHARGED DEBTOR—*Liquidation—After-acquired Property—Goods sent by Mistake—Duty of Trustee—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 15.] A liquidating debtor who had not obtained his discharge engaged in trade. He ordered some goods from a wholesale house, who sent the goods to him in the belief that the order had come from a firm with whom they were acquainted, and whose name resembled that under which the debtor traded. The trustee claimed the goods:—*Held* (reversing the decision of the County Court Judge), that the debtor had acquired no property in the goods, and that the trustee was bound to return them to the persons who sent them. *In re* Reed. *Ex parte* Barnett [123

UNREGISTERED MORTGAGE—*Company—Mortgage to Director—Non-registration—Realization of Security—Subsequent Winding-up—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 43.] A company mortgaged chattels to two of the directors, who furnished the secretary with the necessary particulars for entering it in the register of mortgages, and directed him to register it, but he omitted to do so. The directors put in force the powers in their mortgage and realized their security; and subsequently the company was ordered to be wound up:—*Held*, that as the directors had not "knowingly and wilfully authorized or permitted the omission" of the entry of the mortgage on the register, and had realized their security before the commencement of the winding-up, the liquidator could not compel them to refund the proceeds of the security. *In re* Borough of Hackney Newspaper Company - - 669

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WAY—*Easement — Right of Way — Increase of Servitude—Agricultural User—Mining User—Use of Occupation Road—Change of Use — Present Use—Injunction.*] User for twenty years of a way to a field used only for agricultural purposes does not give a right of way for mineral purposes. The owner of a field, with a right of way to it through an occupation road, agreed to sell the surface of the field (reserving the minerals). The field had never been used for mining, and the vendor did not appear to have any present intention of working the minerals:—*Held*, that the vendor, having had a right to use the road for agricultural purposes only, could not prevent the purchaser from so altering the road as to make it unfit for the use of the vendor in working the minerals under the land agreed to be sold:—*Held*, also, that even if the vendor had a right to use the road for minerals, inasmuch as he had no present intention of working the minerals, the Court would not interfere.—*Quære, per Mellish*, L.J., whether, where an occupation road follows the boundary of two estates so as to afford a presumption of ownership *ad medium filum*, each owner has not the right to use the road for all purposes though the actual user has been only for limited purposes.—Decision of *Bacon*, V.C., reversed. Bradburn *v.* Morris. Morris *v.* Bradburn - - - - 812

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—— Testamentary—Paper - - - 269
See Testamentary Paper.
—— Trust to buy advowson - - 278
See Advowson. 2.

WILL IN DUPLICATE—*Legacy repeated—Evidence.*] At the death of a testator two copies of his will were produced, one of which had been retained by himself, the other deposited with his bankers; each with a codicil containing the same gift in the same words, but of different dates, and attested by different witnesses. Probate having been granted of the duplicate will and of the two codicils:—*Held*, that evidence by one of the attesting witnesses to one of the codicils was admissible for the purpose of shewing, from the circumstances attending the execution, that the two codicils were not two but one instrument, and accordingly that the legatee therein named was entitled to one legacy only. Hubbard *v.* Alexander - - - - - - 738

WILL OF MARRIED WOMAN—*Disposition by Will.*] By marriage settlement personal property was assigned to trustees upon trust to pay the income to the wife for her separate use for life, without power of anticipation, and after her decease, in case her husband should survive, to pay him so much of the income as she should by deed or will appoint for his life, and subject thereto for the children of the marriage; and in case there should be no children, then upon trust in case the wife should survive her husband, for her, her executors, administrators, and assigns, for her sole and separate use; but if she should not survive her husband, then for such of her relations as she should, notwithstanding coverture, by deed or will appoint.—The wife made a will in exercise of the power during coverture, and survived her husband without having had issue of the marriage:—*Held*,

WILL OF MARRIED WOMAN—*continued.*
upon demurrer, that the will, made during coverture, was a good disposition of all the property. BISHOP *v.* WALL - - - - 194
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